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Interim Update
No. 1

West's NORTH CAROLINA GENERAL STATUTES ANNOTATED

This pamphlet directly supplements the 2009 Cumulative Pocket Parts

Statutes current through S.L. 2009-577 (End) of the 2009 Regular Session

Annotations current with cases published through April 5, 2010

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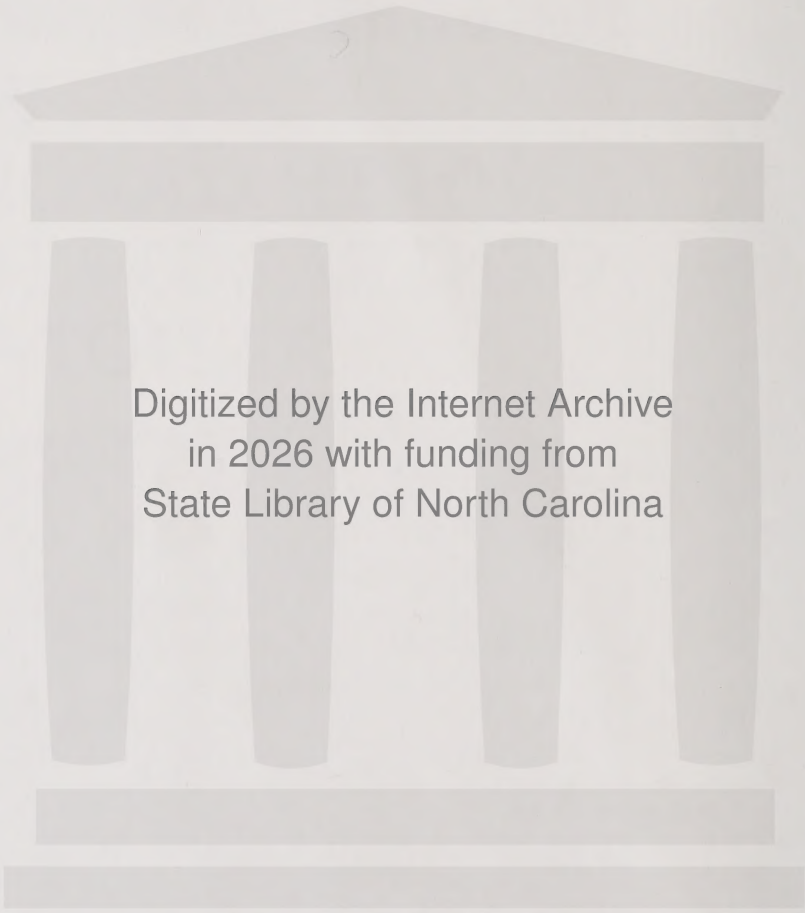
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West's
North Carolina
General Statutes Annotated

June 2010

Interim Update No. 1

Directly Supplementing 2009 N.C.G.S.A. Cumulative Pocket Parts

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Annotations updated with cases published through April 5, 2010

Laws enacted at each legislative session are published in the North Carolina Legislative Service on a current basis, and are also accessible on Westlaw in the NC–LEGIS Database.

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PREFACE

This Interim Update Pamphlet No. 1 directly supplements West's North Carolina General Statutes Annotated 2009 Pocket Parts, and brings to date the text of the General Statutes of North Carolina through S.L. 2009–577 (End) of the 2009 Regular Session of the General Assembly. Annotations covering the judicial constructions and interpretations by the state and federal courts and law review commentaries have also been updated. The annotations from decisions of state and federal courts construing laws close with cases published through April 5, 2010.

Later laws and annotations will be cumulated in the Pocket Part. For advance copies of subsequent laws enacted by the General Assembly, see the North Carolina Legislative Service or the Westlaw NC-LEGIS database.

For a complete and up-to-date numerical table of N.C.G.S.A. Chapters, see the preface in Volume 1, main volume and pocket part.

North Carolina Administrative Code

References to the official North Carolina Administrative Code, containing rules and regulations of state agencies, have been updated and are included herein as a source of related regulatory materials. References to the official North Carolina Administrative Decisions, located under the General Statute section being construed in an administrative opinion, are also included herein.

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ABBREVIATIONS

A.B.A.J.	American Bar Association Journal
A.L.R.	American Law Reports
A.L.R.2d	American Law Reports, Second Series
A.L.R.3d	American Law Reports, Third Series
A.L.R.4th	American Law Reports, Fourth Series
A.L.R.5th	American Law Reports, Fifth Series
A.L.R.6th	American Law Reports, Sixth Series
A.L.R.Fed.	American Law Reports, Federal
A.L.R.Fed.2d	American Law Reports, Federal, Second Series
Am. Jur.	American Jurisprudence
Am. Jur. 2d	American Jurisprudence, Second Edition
Am. Jur. Legal Forms	American Jurisprudence Legal Forms
Am. Jur. Legal Forms 2d	American Jurisprudence Legal Forms, Second Series
Am. Jur. Pl. & Pr. Forms	American Jurisprudence Pleading and Practice Forms
Am. Jur. Proof of Facts	American Jurisprudence Proof of Facts
Am. Jur. Proof of Facts 2d	American Jurisprudence Proof of Facts, Second Series
Am. Jur. Proof of Facts	American Jurisprudence Proof of Facts, Third Series
Am. Jur. Trials	American Jurisprudence Trials
Art.	Article
Black	Blacks Reports, U.S.
B.R.	Bankruptcy Reporter
C.A.	United States Court of Appeals
C.C.	United States Circuit Court
C.C.A.	United States Circuit Court of Appeals
C.J.S.	Corpus Juris Secundum
C.S.	North Carolina Consolidated Statutes of 1919 and 1924
c.	Chapter of Session Law
Cl.	Clause
Cl.Ct.	Claims Court Reporter
Campbell L.Rev.	Campbell Law Review
Code	North Carolina Code of 1883
Code Civ.Proc.	North Carolina Code of Civil Procedure of 1868
Const.	Constitution
D.C.	United States District Court
Duke Envtl. L. & Pol'y F.	Duke Environmental Law & Policy Forum
Duke J.Comp. & Int'l L.	Duke Journal of Comparative & International Law
Duke J. Gender L. & Pol'y	Duke Journal of Gender Law & Policy
Duke L.J.	Duke Law Journal
Eff.	Effective
Ex. Sess.	Extraordinary Session
F.	Federal Reporter
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
Fed.Appx.	Federal Appendix
Fed.Cas.No.	Federal Cases
Fed.Cl.	Federal Claims Reporter
F.R.D.	Federal Rules Decisions
F.Supp.	Federal Supplement

ABBREVIATIONS

F.Supp.2d	Federal Supplement, Second Series
H.B.	House Bill
How.	Howards Reports, U.S.
J.Health Pol. Pol'y & L.	Journal of Health, Politics, Policy & Law
⇦ (Key Number)	North Carolina Digest and other units of the American Digest System
Law & Contemp. Probs.	Law & Contemporary Problems
Laws 19xx	Session Laws of North Carolina through 1996
L.Ed.	United States Reports, Lawyers Edition
L.Ed.2d	United States Reports, Lawyers Edition, Second Series
N.C.	North Carolina Reports
N.C. App.	North Carolina Court of Appeals Reports
N.C. Banking Inst.	North Carolina Banking Institute
N.C. Cent.L.J.	North Carolina Central Law Journal
N.C.G.S.	North Carolina General Statutes of 1943
N.C.J. Int'l L. & Com.Reg.	North Carolina Journal of International Law & Commercial Regulation
N.C.L.Rev.	North Carolina Law Review
NC	North Carolina
NCAC	North Carolina Administrative Code
No.	Number
Op.Atty.Gen.	Opinions Attorney General
Par.	Paragraph
PEB	Permanent Editorial Board for the Uniform Commercial Code
Pet.	Peters Reports, U.S.
Priv.Laws	North Carolina Private Laws
P.R.	Potter's Revisal of 1821 and 1827
Pub. Int. L. Rev.	Public Interest Law Review
Reg. Sess.	Session laws from second year of biennial legislative session
Revisal 1905	North Carolina Revisal of 1905
S.B.	Senate Bill
S.Ct.	Supreme Court Reporter
Sec.	Section of Session Law
S.E.	Southeastern Reporter
S.E.2d	Southeastern Reporter, Second Series
S.L.	Session Laws of North Carolina after 1996 Styled e.g. S.L.1997–9
Sub-subd.	Sub-subdivision
Sub-subpar.	Sub-subparagraph
Subd.	Subdivision
Subpar.	Subparagraph
Subsec.	Subsection
U.C.C.	Uniform Commercial Code
U.L.A.	Uniform Laws Annotated
U.S.	United States Reports
U.S.C.A.	United States Code Annotated
Wall.	Wallace's Reports, U.S.
Wake Forest L.Rev.	Wake Forest Law Review
Wheat.	Wheaton's Reports, U.S.

Division Case Codes

ABC	Alcoholic Beverage Control Commission
BAR	State Bar
BDA	Board of Dental Examiners
BEE	Board of Electrolysis Examiners
BME	Board of Medical Examiners
BMS	Board of Mortuary Science
BOC	Board of Chiropractic Examiners
BOG	Board of Geologists
BON	Board of Nursing
BOO	Board of Opticians
BPP	Board of Practicing Psychologists
CFA	Commission for Auctioneers
CPA	Certified Public Accountants
COM	Department of Economic and Community Development
CPS	Department of Crime Control and Public Safety
CSE	Child Support Enforcement
DAG	Department of Agriculture
DCC	Department of Community Colleges
DCR	Department of Cultural Resources
DCS	Distribution Child Support
DHR	Department of Human Resources
DOA	Department of Administration
DOC	Department of Correction
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DSA	Department of State Auditor
DST	Department of State Treasurer
EDC	Department of Public Instruction
EEO	Equal Employment Opportunity Commission
EHR	Department of Environment, Health and Natural Resources
ESC	Employment Security Commission
HAF	Hearing Aid Dealers and Fitters Board
HRC	Human Relations Commission
IND	Independent Agencies
INS	Department of Insurance
LBC	Licensing Board for Contractors
MLK	Milk Commission
NHA	Board of Nursing Home Administrators
OAH	Office of Administrative Hearings
OCS	Office of the State Controller
OSP	Department of State Personnel
PHC	Board of Plumbing and Heating Contractors
POD	Board of Podiatry Examiners
SOS	Department of Secretary of State
SPA	Board of Examiners of Speech and Language Pathologists and Audiologists
UNC	University of North Carolina
WRC	Wildlife Resources Commission

*

EFFECTIVE DATES OF SESSION LAWS

Effective dates of amendments to the General Statutes are supplied in the credits which refer to the amending Session Law. Frequently, specific provisions in the Session Law are controlling as to when the amendment takes effect. In the absence of a specific provision in a Session Law, the following statutes and Constitutional provision may be helpful in determining effective date information.

N.C.G.S.A. § 120–20 provides:

"§ 120–20. When acts take effect

"Acts of the General Assembly shall be in force only from and after 60 days after the adjournment of the session in which they shall have passed, unless the commencement of the operation thereof be expressly otherwise directed."

N.C.G.S.A. § 120–29.1 provides:

"§ 120–29.1. Approval of bills

"(a) If the Governor approves a bill, the Governor shall write upon the same, below the signatures of the presiding officers of the two houses, the fact, date, and time of approval, as follows: 'Approved ___.m. this ___ day of _____, ___' and shall sign the same as follows: '_____ Governor'. The Governor shall then return the approved bill to the enrolling clerk.

"(b) If any bill becomes law because of the failure of the Governor to take any action, it shall be the duty of the Governor to return the measure to the enrolling clerk, who shall sign the following certificate on the measure and deposit it with the Secretary of State: 'This bill having been presented to the Governor for his signature on the ___ day of _____, ___ and the Governor having failed to approve it within the time prescribed by law, the same is hereby declared to have become a law.

'This ___ day of _____, ___, _____ Enrolling Clerk'.

"(c) If the Governor returns any bill to the house of origin with his objections, the Governor shall write such objections on the measure or cause the objections to be attached to the measure. When any such bill becomes law after reconsideration of the two houses, the principal clerk of the second house to act shall, below the objections of the Governor, sign the following certificate: 'Became law notwithstanding the objections of the Governor, ___. m. this ___ day of _____, ___.' The principal clerk of the second house to act shall fill in the time. The enrolling clerk shall deposit the measure with the Secretary of State.

"(d) In calculating the period under Section 22(7) of Article II of the North Carolina Constitution, the day on which the bill is presented to the Governor shall be excluded and the entire last day of the period is included."

N.C.G.S.A. Const. Art. II, § 22, provides:

"Sec. 22. Action on bills

"(1) Bills subject to veto by Governor; override of veto. Except as provided by subsections (2) through (6) of this section, all bills shall be read three times in each house and shall be signed by the presiding officer of each house before being presented to the Governor. If the Governor approves, the Governor shall sign it and it shall become a law; but if not, the Governor shall return it with objections, together with a veto message stating the reasons for such objections, to that house in which it shall have originated, which shall enter the objections and veto message at large on its journal, and proceed to reconsider it. If after such reconsideration three-fifths of the members of that house present and voting shall agree to pass the bill, it shall be sent, together with the objections and veto message, to the other house, by which it shall likewise be reconsidered; and if approved by three-fifths of the members of that house present and voting, it shall become a law notwithstanding the objections of the Governor. In all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting shall be entered on the journal of each house respectively.

"(2) Amendments to Constitution of North Carolina. Every bill proposing a new or revised Constitution or an amendment or amendments to this Constitution or calling a convention of the people of this State, and containing no other matter, shall be submitted to the qualified voters of this State after it shall have been read three times in each house and signed by the presiding officers of both houses.

"(3) Amendments to Constitution of the United States. Every bill approving an amendment to the Constitution of the United States, or applying for a convention to propose amendments to the Constitution of the United States, and containing no other matter, shall be read three times in each house before it becomes law, and shall be signed by the presiding officers of both houses.

"(4) Joint resolutions. Every joint resolution shall be read three times in each house before it becomes effective and shall be signed by the presiding officers of both houses.

"(5) Other exceptions. Every bill:

"(a) In which the General Assembly makes an appointment or appointments to public office and which contains no other matter;

"(b) Revising the senate districts and the apportionment of Senators among those districts and containing no other matter;

"(c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter; or

"(d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other matter,

"shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses.

"(6) Local bills. Every bill that applies in fewer than 15 counties shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses. The exemption from veto by the

Governor provided in this subsection does not apply if the bill, at the time it is signed by the presiding officers:

"(a) Would extend the application of a law signed by the presiding officers during that two year term of the General Assembly so that the law would apply in more than half the counties in the State, or

"(b) Would enact a law identical in effect to another law or laws signed by the presiding officers during that two year term of the General Assembly that the result of those laws taken together would be a law applying in more than half the counties in the State.

"Notwithstanding any other language in this subsection, the exemption from veto provided by this subsection does not apply to any bill to enact a general law classified by population or other criteria, or to any bill that contains an appropriation from the State treasury.

"(7) Time for action by Governor; reconvening of session. If any bill shall not be returned by the Governor within 10 days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the General Assembly shall have adjourned:

"(a) For more than 30 days jointly as provided under Section 20 of Article II of this Constitution; or

"(b) Sine die

"in which case it shall become a law unless, within 30 days after such adjournment, it is returned by the Governor with objections and veto message to that house in which it shall have originated. When the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Governor shall reconvene that session as provided by Section 5(11) of Article III of this Constitution for reconsideration of the bill, and if the Governor does not reconvene the session, the bill shall become law on the fortieth day after such adjournment. Notwithstanding the previous sentence, if the Governor prior to reconvening the session receives written requests dated no earlier than 30 days after such adjournment, signed by a majority of the members of each house that a reconvened session to reconsider vetoed legislation is unnecessary, the Governor shall not reconvene the session for that purpose and any legislation vetoed in accordance with this section after adjournment shall not become law.

"(8) Return of bills after adjournment. For purposes of return of bills not approved by the Governor, each house shall designate an officer to receive returned bills during its adjournment."

*

CITE THIS BOOK

By Section
Thus: West's N.C.G.S.A. § _____

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WEST'S
NORTH CAROLINA
GENERAL STATUTES ANNOTATED

Chapter 1

Civil Procedure

SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS

ARTICLE 1

Definitions

§ 1–5. Criminal action

Notes of Decisions

1. In general

A hearing on a petition for satellite based monitoring (SBM) was a civil, rather than criminal, proceeding, for appeal purposes; there is no jury and no sentence in a SBM proceeding, and there is no entry of a plea of guilty, not guilty, or no contest. State v. Singleton, 2010, 2010 WL 59255. Mental Health ⇦ 469(6)

§ 1–6. Civil action

Notes of Decisions

1. In general

A hearing on a petition for satellite based monitoring (SBM) was a civil, rather than criminal, proceeding, for appeal purposes; there is no jury and no sentence in a SBM proceeding, and there is no entry of a plea of guilty, not guilty, or no contest. State v. Singleton, 2010, 2010 WL 59255. Mental Health ⇦ 469(6)

SUBCHAPTER II. LIMITATIONS

ARTICLE 3

Limitations, General Provisions

§ 1–15. Statute runs from accrual of action

Notes of Decisions

36. Decedent's estates

Four-year statute of repose began to run on causes of action, for alleged professional negligence, fraud, and obstruction of justice, by client's estate and heirs against attorney who had prepared client's will and subsequently testified by affidavit in underlying quiet title action by client's widow against client's estate and heirs, at time when will was prepared, not on date that attorney prepared affidavit. Self v. Yelton, 2010, 2010 WL 59275. Limitation of Actions ⇦ 55(3); Limitation of Actions ⇦ 95(3); Limitation of Actions ⇦ 100(12)

Article 5

Limitations, Other than Real Property

§ 1–50. Six years

Notes of Decisions

22. Pleading

City, by its failure to advance the statute of repose issue in its principal brief, abandoned, for purposes of appeal, its assignment of error relating to the denial of its motion for summary judgment on the ground that the six-year statute of repose barred negligence claim brought by estate of minor bicyclist, who was struck and killed by motorist's vehicle; city raised issue only in its reply brief, and appellate rule limited the reply brief to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief. Beckles-Palomares v. Logan, 2010, 2010 WL 348396. Appeal and Error ⇐ 762; Appeal and Error ⇐ 1079

§ 1–52. Three years

Notes of Decisions

92. Review

Neighbors brought challenge to subdivision ordinance's notice provisions within three years of the date upon which they learned of approval for subdivision as required under three-year statute of limitations. Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte, 2010, 2010 WL 355440. Limitation of Actions ⇐ 95(8)

§ 1–54.1. Two months

Notes of Decisions

2. In general

Two-month limitations period for challenges to zoning ordinances did not apply to neighbors' challenge to subdivision ordinance's notice provisions, as zoning and subdivision ordinances were separately regulated. Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte, 2010, 2010 WL 355440. Zoning and Planning ⇐ 584.1

SUBCHAPTER IIIA. JURISDICTION

Article 6A

Jurisdiction

§ 1–75.4. Personal jurisdiction, grounds for generally

Notes of Decisions

22. —— Contracts, minimum contacts

Shareholder of health insurance administrator, which had contemplated merger with home healthcare provider, had sufficient minimum contacts with North Carolina to satisfy due process requirements for the exercise of personal jurisdiction in provider's counterclaim for, inter alia, breach of contract and fraud, even though such contacts were not continuous and systematic; shareholder specifically directed his contact concerning the merger to provider's president and other board members in North Carolina, and shareholder's contacts included two visits to North Carolina concerning the proposed merger, several telephone communications initiated by shareholder to provider's president in North Carolina, and multiple e-mails that shareholder sent to president concerning the merger that were directed to president's office in North Carolina. Olympus Managed Health Care, Inc. v. American Housecall Physicians, Inc., 2009, 2009 WL 3205944. Constitutional Law ⇐ 3965(10); Federal Courts ⇐ 76.20

§ 1–75.12. Stay of proceeding to permit trial in a foreign jurisdiction

Notes of Decisions

3. Factors considered

In determining whether to grant a stay, it is not necessary that the trial court find that all factors positively support a stay, as long as it is able to conclude that: (1) a substantial injustice would

result if the trial court denied the stay; (2) the stay is warranted by those factors present; and (3) the alternative forum is convenient, reasonable, and fair. Wachovia Bank, Nat. Ass'n v. Harbinger Capital Partners Master Fund I, Ltd., 2009, 2009 WL 4916544.

4. Abuse of discretion

While a trial court does not abuse its discretion by not considering each and every factor for granting a stay, the court does abuse its discretion if it abandons any consideration of these factors which the Court of Appeals has deemed relevant in determining whether a stay is warranted. Wachovia Bank, Nat. Ass'n v. Harbinger Capital Partners Master Fund I, Ltd., 2009, 2009 WL 4916544.

6. Exercise of discretion

Judge did not abuse his discretion in staying bank's North Carolina action against hedge funds and fund agents, where more comprehensive New York action filed by hedge fund defendants was better able to arrive at a resolution of the litigation given its broader scope. Wachovia Bank, Nat. Ass'n v. Harbinger Capital Partners Master Fund I, Ltd., 2009, 2009 WL 4916544.

SUBCHAPTER VIII. JUDGMENT

ARTICLE 26

Declaratory Judgments

§ 1–253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations

Notes of Decisions

1. In general

The Declaratory Judgment Act affords an appropriate procedure for alleviating uncertainty in the interpretation of written instruments and for clarifying litigation. Lynn v. Lynn, 2010, 2010 WL 537464. Declaratory Judgment ⇦ 141

SUBCHAPTER IX. APPEAL

ARTICLE 27

Appeal

§ 1–277. Appeal from superior or district court judge

Notes of Decisions

16. Interlocutory decisions—In general

There is no right of immediate appeal from an interlocutory order except in two instances: (1) the order is final as to some claims or parties, and the trial court certifies that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed. Land v. Land, 2010, 2010 WL 59251.

Trial court order was "interlocutory" which entered judgment of liability against defendants in bifurcated case, and thus, appeal from the order was precluded unless defendants could establish that a substantial right would be lost if the trial court's order was not immediately reviewed by the appellate court; the judgment did not dispose of the matter of plaintiffs' damages, and trial court did not certify its "interlocutory judgment on liability" order as immediately appealable. Land v. Land, 2010, 2010 WL 59251.

The reason for procedural rules generally disallowing appeal from interlocutory orders is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Land v. Land, 2010, 2010 WL 59251.

There are two ways by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims and the trial court certifies there is no just reason to delay the appeal, or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Tands, Inc. v. Coastal Plains Realty, Inc., 2009, 686 S.E.2d 164. Appeal and Error ⇦ 68; Appeal and Error ⇦ 366

17. —— Interlocutory defined, interlocutory decisions

An "interlocutory" order, for purposes of appeal, is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. Land v. Land, 2010, 2010 WL 59251.

24. —— Witnesses and evidence, interlocutory decisions

Trial court's interlocutory order granting Board of Dental Examiners' motion to enforce investiga-

tive panel's subpoenas for dentist's patient records in Board's disciplinary investigation affected a substantial right and thus was subject to immediate appellate review; dentist asserted statutory privilege based on HIPAA. North Carolina State Bd. of Dental Examiners v. Woods, 2010, 2010 WL 313556. Health ⇐ 223(1)

Although an interlocutory order regarding discovery matters is generally not immediately appealable, when a party asserts a statutory privilege, which directly relates to the matter to be disclosed under the order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right and thus is immediately appealable. North Carolina State Bd. of Dental Examiners v. Woods, 2010, 2010 WL 313556. Appeal and Error ⇐ 70(4)

28. —— Judgment and new trial, interlocutory decisions

Language in procedural rules permitting immediate appeal from an order denying a new trial did not apply to denial of new trial only as to liability phase of bifurcated trial, in which trial an order was entered finding defendants liable but in which trial the issue of damages had yet to be decided, and therefore, defendants seeking appeal from the interlocutory order were required to show that a substantial right was affected. Land v. Land, 2010, 2010 WL 59251.

29. —— Resolution of claims in single action, interlocutory decisions

Commercial lessee would not be subjected to inconsistent verdicts so as to be denied a substantial right absent immediate review of trial court's interlocutory order denying lessee's motion for summary judgment on claim for declarations as to what it owed in rent under lease agreement and whether lessor had duty to mitigate damages, and order granting partial summary judgment to lessor on duty to mitigate damages; although protracted, lessee could appeal judgment rendered at the conclusion of the current trial, be granted a new trial, and prevail pursuant to a favorable verdict and judgment. Tands, Inc. v. Coastal Plains Realty, Inc., 2009, 686 S.E.2d 164. Declaratory Judgment ⇐ 392.1

30. Substantial rights—In general

For purposes of whether a judicial order is immediately appealable, a right is "substantial" when it will clearly be lost or irremediably and adversely affected if the order is not reviewed before final judgment. Asheville Jet, Inc. v. City of Asheville, 2010, 2010 WL 309458.

The "substantial right" test for appealability is more easily stated than applied; it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Asheville Jet, Inc. v. City of Asheville, 2010, 2010 WL 309458.

36. —— Trial, substantial rights

The possibility that defendants may be required to defend two "trials" on the same issues does not create a per se right to immediate appeal of an interlocutory order; ordinarily the possibility of undergoing a second trial affects a "substantial right" only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue. Asheville Jet, Inc. v. City of Asheville, 2010, 2010 WL 309458.

Claims asserted and remedies sought by plaintiff operating as Fixed Based Operator (FBO) at regional airport, as against regional airport authority and city, in Federal Aviation Administration (FAA) proceedings and in state court, were so dissimilar that no factual or issue determination made in one would be binding on the other, and therefore, there was not a possibility of prejudice to airport authority or city from inconsistent "verdicts," and no "substantial right" was affected to warrant immediate appeal from state trial court's denial of motions to dismiss; to the extent, if any, that state trial court's ruling encroached on the FAA's exclusive jurisdiction concerning grant assurances relevant to the case, the state court disposition could not bind the FAA in its proceeding. Asheville Jet, Inc. v. City of Asheville, 2010, 2010 WL 309458.

Fact that a second jury would decide issue of damages after first jury decided liability as against defendants in business court action, did not affect a "substantial right" of defendants so as to permit immediate appeal from the interlocutory order entered on their liability; defendants moved for and obtained bifurcated trial over plaintiffs' objections, and the issues decided in the two trials were separate and distinct such that there was no possibility of inconsistent verdicts. Land v. Land, 2010, 2010 WL 59251.

Article 27A

Appeals and Transfers From the Clerk

§ 1–301.1. Appeal of clerk's decision in civil actions

Notes of Decisions

4. Scope of jurisdiction

Superior Court had subject matter jurisdiction over appeal of clerk's order permitting foreclosure, even assuming that the action was erroneously transferred and that the party who filed the appeal was not aggrieved, as trial judge had full power to

consider and determine all matters in controversy as if the cause was originally before him and had the discretion to add any necessary parties. Trustee Services, Inc. v. R.C. Koonts and Sons Masonry, Inc., 2010, 2010 WL 348185. Mortgages ⇐ 347

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS

ARTICLE 44

Compromise

§ 1–540.2. Settlement of property damage claims arising from motor vehicle collisions or accidents; same not to constitute admission of liability, nor bar party seeking damages for bodily injury or death

Notes of Decisions

1. In general

Passenger's pleading of accord and satisfaction as a defense to motorist's counterclaim for property damage allegedly sustained in vehicle collision could not act as a bar to passenger's personal injury claim against motorist, absent an executed release or settlement agreement documenting settlement of any personal injury claim or all claims. Hewett v. Weisser, 2009, 2009 WL 5174088. Accord and Satisfaction ⇐ 1

Chapter 1A

Rules of Civil Procedure

ARTICLE 2

Commencement of Action; Service of Process, Pleadings, Motions, and Orders

Rule 4. Process

Notes of Decisions

45. —— Waiver, defects

Mother's participation in termination of parental rights action waived any objection to personal jurisdiction based on improper service of summons, and thus trial court had jurisdiction over mother, where mother filed an answer to the termination petition, appeared, presented evidence, and was represented by counsel without objecting to personal jurisdiction. In re N.E.L., 2010, 2010 WL 537615. Infants ⇐ 198

45.5. Jurisdiction

Mother's general appearance at non-secure custody hearings resulted in waiver of any objection to personal jurisdiction in neglect and dependency action, and thus trial court had jurisdiction over the action and issued a valid custody order to Department of Social Services (DSS), which gave DSS standing to file petition for termination of parental rights; although summonses were issued one day after juvenile petitions were filed, mother was not served until after their expiration. In re S'N.A.S., 2009, 2009 WL 5067401.

ARTICLE 3

Pleadings and Motions

Rule 8. General rules of pleadings

Notes of Decisions

1. In general

Plaintiffs are entitled to seek alternative forms of relief. Scheerer v. Fisher, 2010, 2010 WL 313700. Pleading ⇐ 53(1)

31. Review

Husband's amended answer, in which he alleged that "The parties understood that, despite the title, these properties would remain the sole property of the Respondent and that they would pass, as a

whole, to the parties' only son," sufficiently described alleged oral agreement as required to survive motion for summary judgment on defense of estoppel to wife's claim for partition of real property. Dillingham v. Dillingham, 2010, 2010 WL 348343. Judgment ⇐ 181(11)

Father's failure to file an answer to the complaint, in proceeding initiated by mother of his child for a domestic violence protection order (DVPO), did not permit trial court to enter a DVPO against father based upon the allegations of the verified complaint without hearing any additional evidence; mother did not file a motion for entry of default judgment against father for his failure to answer, and trial court entered DVPO based only on its personal recollection of the father's criminal trial. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇐ 57

Rule 11. Signing and verification of pleadings

Notes of Decisions

16. Sanctions—In general

Trial court imposed $500 sanction against defendant's appointed counsel, for filing vexatious and meritless motions for improper purpose of harassing the prosecution, pursuant to its inherent authority, not pursuant to rules of civil procedure, as would be improper in a criminal matter. In re Small, 2009, 2009 WL 5174284. Attorney and Client ⇐ 24

Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading

Notes of Decisions

I. IN GENERAL

37. Costs and attorney fees

Lot owners did not cite any legal authority in support of argument on appeal that no basis existed under any statute or Rule of Civil Procedure for such an award of attorney fees to homeowners association for successful motion to dismiss lot owners' punitive damages claim, and thus issue did not warrant appellate review. Moss Creek Homeowners Ass'n, Inc. v. Bissette, 2010, 2010 WL 356195. Appeal and Error ⇐ 756

III. LACK OF JURISDICTION

116. Subject matter jurisdiction, lack of jurisdiction—In general

A court's lack of subject matter jurisdiction is not waivable and can be raised at any time. In re N.E.L., 2010, 2010 WL 537615. Courts ⇐ 37(1); Courts ⇐ 37(2)

117. —— Administrative actions and proceedings, subject matter jurisdiction, lack of jurisdiction

An action is properly dismissed for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies. Johnson v. University of North Carolina, 2010, 2010 WL 356273. Administrative Law and Procedure ⇐ 229; Pretrial Procedure ⇐ 554

An appellate court's review of a dismissal for lack of subject matter jurisdiction, due to failure to exhaust administrative remedies, is de novo. Johnson v. University of North Carolina, 2010, 2010 WL 356273. Appeal and Error ⇐ 893(1)

117.5. —— Standing, subject matter jurisdiction, lack of jurisdiction

The absence of standing is appropriately addressed by a dismissal motion. Munger v. State, 2010, 2010 WL 537641. Pretrial Procedure ⇐ 556.1

124. —— Service of process, personal jurisdiction, lack of jurisdiction

Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner. In re N.E.L., 2010, 2010 WL 537615. Courts ⇐ 37(1); Courts ⇐ 37(2)

131. Review, lack of jurisdiction

When reviewing a motion to dismiss for lack of subject matter jurisdiction, a trial court may consider and weigh matters outside the pleadings. Munger v. State, 2010, 2010 WL 537641. Pretrial Procedure ⇐ 681

If the trial court confines its evaluation to the pleadings when reviewing a motion to dismiss for lack of subject matter jurisdiction, the court must accept as true the plaintiff's allegations and construe them in the light most favorable to the plaintiff. Munger v. State, 2010, 2010 WL 537641. Pretrial Procedure ⇐ 679

Court of Appeals' review of an order granting a motion to dismiss for lack of subject matter jurisdiction is de novo, except to the extent the trial court resolves issues of fact and those findings are binding on the Court of Appeals if supported by competent evidence in the record. Munger v. State, 2010, 2010 WL 537641. Appeal and Error ⇐ 893(1); Appeal and Error ⇐ 1024.3

V. PROCESS AND SERVICE INSUFFICIENCY

198. Waiver and estoppel, process and service insufficiency

Mother's participation in termination of parental rights action waived any objection to personal jurisdiction based on improper service of summons, and thus trial court had jurisdiction over mother, where mother filed an answer to the termination

petition, appeared, presented evidence, and was represented by counsel without objecting to personal jurisdiction. In re N.E.L., 2010, 2010 WL 537615. Infants ⇦ 198

VIII. FAILURE TO STATE CLAIM

373. Review, failure to state claim—In general

When reviewing a complaint dismissed for failure to state a claim, Supreme Court treat a plaintiff's factual allegations as true. Copper ex rel. Copper v. Denlinger, 2010, 2010 WL 325372. Appeal and Error ⇦ 919

IX. MOTION FOR JUDGMENT ON PLEADINGS

401. Construction and application, motion for judgment on pleadings

Judgment on the pleadings is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain. Builders Mut. Ins. Co. v. Glascarr Properties, Inc., 2010, 2010 WL 348346. Pleading ⇦ 349

409. Authority and discretion of court, motion for judgment on pleadings

Trial court could consider insurance policy, which was attached to insurer's complaint and which insured admitted appeared to be a copy of the policy, when considering insurer's motion for judgment on the pleadings. Builders Mut. Ins. Co. v. Glascarr Properties, Inc., 2010, 2010 WL 348346. Pleading ⇦ 350(8)

425. Review, motion for judgment on pleadings

Trial court could consider insurance policy, which was attached to insurer's complaint and which insured admitted appeared to be a copy of the policy, when considering insurer's motion for judgment on the pleadings. Builders Mut. Ins. Co. v. Glascarr Properties, Inc., 2010, 2010 WL 348346. Pleading ⇦ 350(8)

The Court of Appeals reviews de novo a trial court's ruling on motions for judgment on the pleadings; under a de novo standard of review, the Court considers the matter anew and freely substitutes its own judgment for that of the trial court. Builders Mut. Ins. Co. v. Glascarr Properties, Inc., 2010, 2010 WL 348346. Appeal and Error ⇦ 893(1)

ARTICLE 4

Parties

Rule 24. Intervention

Notes of Decisions

1. Construction and application

A party is entitled to intervene under rule in the event that he or she can demonstrate (1) an interest relating to the property or transaction, (2) practical impairment of the protection of that interest, and (3) inadequate representation of the interest by existing parties. Bailey and Associates, Inc. v. Wilmington Bd. of Adjustment, 2010, 2010 WL 355694. Parties ⇦ 40(2); Parties ⇦ 41

28. Review—In general

The Court reviews a trial court's decision granting or denying a motion to intervene under rule on a de novo basis. Bailey and Associates, Inc. v. Wilmington Bd. of Adjustment, 2010, 2010 WL 355694. Appeal and Error ⇦ 893(1)

29. —— Grant of intervention, review

Neighbors' allegation that development of creekside parcel without Conservation Overlay District controls would increase traffic, light pollution, noise and other related pollution that would lead to a pecuniary loss in the value of their properties was sufficient to confer standing on them to intervene in developer's action which challenged board of adjustment decision that developer's property, which also was adjacent to creek, was located in Conservation Overlay District and thus was subject to various controls. Bailey and Associates, Inc. v. Wilmington Bd. of Adjustment, 2010, 2010 WL 355694. Zoning and Planning ⇦ 583

ARTICLE 6

Trials

Rule 42. Consolidation; separate trials

Notes of Decisions

4. Discretion of court

Decisions of the trial court to bifurcate trial proceedings are reviewed by the appellate courts under an abuse of discretion standard. Land v. Land, 2010, 2010 WL 59251.

When a motion to bifurcate is pursuant to statute governing bifurcation of issues of compensatory and punitive damages, then the trial court is obliged to follow the procedures set forth in that statute; however, where the motion to bifurcate is made under the more general provision of rules of civil procedure regarding separate trials, the trial court is not so bound. Land v. Land, 2010, 2010 WL 59251.

Trial court did not act outside its discretion by releasing jury at conclusion of liability phase of

trial that had been bifurcated on defendants' motion made pursuant to general rule of civil procedure governing separate trials, even though the verdict included finding that defendants were liable for punitive damages and statute governing motions for bifurcation to try punitive and compensatory damages separately required that the issues be determined by same trier of fact; since defendants' motion for bifurcation was not made pursuant to statute governing bifurcation of damages, but rather was made to separate issues of liability and damages for economy of discovery, trial court was not required to have the issues heard by same trier of fact. Land v. Land, 2010, 2010 WL 59251.

Rule 52. Findings by the court

Notes of Decisions

54. —— Domestic law cases, review

An ex parte domestic violence protection order (DVPO) need not contain findings and conclusions that fully satisfy the requirements of the rule of civil procedure governing such findings and conclusions. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 50

Article 7

Judgment

Rule 54. Judgments

Notes of Decisions

28. —— Orders deemed interlocutory

Trial court order was "interlocutory" which entered judgment of liability against defendants in bifurcated case, and thus, appeal from the order was precluded unless defendants could establish that a substantial right would be lost if the trial court's order was not immediately reviewed by the appellate court; the judgment did not dispose of the matter of plaintiffs' damages, and trial court did not certify its "interlocutory judgment on liability" order as immediately appealable. Land v. Land, 2010, 2010 WL 59251.

Trial court order which entered judgment of liability against defendants in bifurcated case was "interlocutory," and thus, appeal from the order was precluded unless defendants could establish that a substantial right would be lost if the trial court's order was not immediately reviewed by the appellate court; the judgment did not dispose of the matter of plaintiffs' damages, and trial court did not certify its "interlocutory judgment on liability" order as immediately appealable. Land v. Land, 2010, 2010 WL 59251. Appeal and Error ⇦ 80(4); Appeal and Error ⇦ 366

51. —— Substantial rights affected, review of summary judgments

Commercial lessee would not be subjected to inconsistent verdicts so as to be denied a substantial right absent immediate review of trial court's interlocutory order denying lessee's motion for summary judgment on claim for declarations as to what it owed in rent under lease agreement and whether lessor had duty to mitigate damages, and order granting partial summary judgment to lessor on duty to mitigate damages; although protracted, lessee could appeal judgment rendered at the conclusion of the current trial, be granted a new trial, and prevail pursuant to a favorable verdict and judgment. Tands, Inc. v. Coastal Plains Realty, Inc., 2009, 686 S.E.2d 164. Declaratory Judgment ⇦ 392.1

53. —— Denial of judgment, review of summary judgments

Claims were intertwined such that commercial lessee was not entitled to immediate review of trial court's interlocutory order denying lessee's motion for summary judgment on claim for declaration as to its liability under lease agreement and whether lessor had duty to mitigate damages, and order granting partial summary judgment to lessor on duty to mitigate damages, notwithstanding trial court's certification for appeal and determination that there was no just reason to delay; the issues of rent and lessee's potential liability remained unresolved, and lessor's purported duty to mitigate damages was intertwined with the amount and correctness of a damages award. Tands, Inc. v. Coastal Plains Realty, Inc., 2009, 686 S.E.2d 164. Declaratory Judgment ⇦ 392.1

60. Review of interlocutory orders—In general

Interlocutory orders are immediately appealable in only two instances: (1) if the trial court certifies that there is no just reason to delay the appeal or (2) when the challenged order affects a substantial right the appellant would lose without immediate review. North Carolina State Bd. of Dental Examiners v. Woods, 2010, 2010 WL 313556. Appeal and Error ⇦ 68; Appeal and Error ⇦ 366

There is no right of immediate appeal from an interlocutory order except in two instances: (1) the order is final as to some claims or parties, and the trial court certifies that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed. Land v. Land, 2010, 2010 WL 59251.

62. —— Tests, review of interlocutory orders

Commercial vendor's appeal from grant of purchaser's motion to dismiss for failure to state a claim was interlocutory and thus subject to dismissal, where vendor's complaint stated causes of action against multiple defendants such that dismissal was not a final judgment as to all parties to the litigation, trial court did not certify that there was no just reason for delay, and there was no showing that order affected any substantial right of vendor. Pentecostal Pilgrims v. Connor, 2010, 2010 WL 310092. Appeal and Error ⇦ 80(6); Appeal and Error ⇦ 782

In order to appeal an interlocutory order, an appellant must demonstrate that either the trial court certified its order for immediate appeal or that the order deprives the appellant of a substantial right. Waddell v. Metropolitan Sewerage Dist. of Buncombe County, 2009, 2009 WL 5067452. Appeal and Error ⇦ 68; Appeal and Error ⇦ 366

Rule 55. Default

Notes of Decisions

I. DEFAULT JUDGMENT

33. Application for judgment, default judgment—Necessity

Father's failure to file an answer to the complaint, in proceeding initiated by mother of his child for a domestic violence protection order (DVPO), did not permit trial court to enter a DVPO against father based upon the allegations of the verified complaint without hearing any additional evidence; mother did not file a motion for entry of default judgment against father for his failure to answer, and trial court entered DVPO based only on its personal recollection of the father's criminal trial. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 57

Rule 56. Summary judgment

Notes of Decisions

110. Weight and sufficiency of evidence in support of motion

Summary judgment is inappropriate where reasonable minds might easily differ as to the import of the evidence. Bird v. Bird, 2010, 2010 WL 325358. Judgment ⇦ 185(6)

114. —— Personal knowledge or belief of affiant, affidavits, form, requisites and execution

A trial court may not consider that portion of a summary judgment affidavit which is not based on an affiant's personal knowledge. Blackwell v. Hatley, 2010, 2010 WL 348187. Judgment ⇦ 185.1(3)

Private investigator's affidavit satisfied personal knowledge requirement, as submitted by former husband in opposition to summary judgment on his post-divorce motion to terminate alimony based on former wife's alleged cohabitation, though observations of former wife's alleged cohabitant were set out in the passive voice; private investigator stated at beginning of affidavit that she was retained to investigate possible cohabitation, and although name of her investigative agency included "associates" in addition to her name, there was no record or mention of any other individual performing the instant investigation. Bird v. Bird, 2010, 2010 WL 325358. Judgment ⇦ 185.1(3)

127. Evidence considered in disposition of motion—In general

Affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment. Blackwell v. Hatley, 2010, 2010 WL 348187. Judgment ⇦ 185.1(1); Judgment ⇦ 185(3)

If there is any question as to the weight of evidence, summary judgment should be denied. Bird v. Bird, 2010, 2010 WL 325358. Judgment ⇦ 185(5)

128. —— Forecast of evidence, evidence considered in disposition of motion

The trial court should consider the forecasts of evidence on a summary judgment motion in the light most favorable to the nonmoving party. Bird v. Bird, 2010, 2010 WL 325358. Judgment ⇦ 185(2)

The evidence forecast by the party against whom summary judgment is contemplated is to be indulgently regarded, while that of the party to benefit from summary judgment must be carefully scrutinized. Bird v. Bird, 2010, 2010 WL 325358. Judgment ⇦ 185(2)

Rule 59. New trials; amendment of judgments

Notes of Decisions

8. —— New trial, discretion of trial court

The power vested in the trial courts to grant a new trial are very broad indeed, and should be exercised carefully and reluctantly. Boykin v. Wilson Medical Center, 2009, 2009 WL 5067400. New Trial ⇦ 1

25. Grounds for new trial—In general

The trial court may order a new trial where a palpable miscarriage of justice would result, where justice and equity so require, or when it would work an injustice to let the verdict stand. Boykin

v. Wilson Medical Center, 2009, 2009 WL 5067400. New Trial ⇐ 13

49. Evidence in support of new trial—In general

Evidence was sufficient to support finding that compressed trial schedule influenced the jury, and thus to grant new trial in negligence action against health care providers; jurors were away from their homes, jobs, and daily routines and were placed in a new, stressful environment, presiding judge was able to personally observe the effects of the trial schedule on the jurors, and jury deliberated for approximately 45 minutes before returning a verdict late at night. Boykin v. Wilson Medical Center, 2009, 2009 WL 5067400. New Trial ⇐ 21; New Trial ⇐ 27

70. —— Preservation by objections or exceptions, review

Administratrix's failure to object to trial schedule as proposed by the trial court at the commencement of the trial did not create "invited error" and result in waiver of any right to seek a new trial based on the trial schedule and its resulting consequence, where all counsel advised the court that the case would take seven days of trial to complete, and court made the decision to shoehorn the case into three and a half days without any encouragement from the parties. Boykin v. Wilson Medical Center, 2009, 2009 WL 5067400. New Trial ⇐ 26

74. —— Discretion of trial court, review

Trial court did not abuse its discretion in granting new trial based on trial schedule, which court unilaterally compressed from requested seven days into three and a half days; court was able to personally observe the level of fatigue in the attorneys and jurors, and to gauge the level of attentiveness of the jurors. Boykin v. Wilson Medical Center, 2009, 2009 WL 5067400. New Trial ⇐ 21

Rule 60. Relief from judgment or order

Notes of Decisions

59. —— Paternity, domestic relations judgments

Mother was not entitled to DNA testing of putative father on her motion for proof of paternity filed over five years after putative father's paternity was established judicially by a trial court order determining he was child's biological father, where mother never appealed or sought relief from that order. Helms v. Landry, 2009, 686 S.E.2d 674. Children Out–Of–Wedlock ⇐ 68

91. —— Newly discovered evidence, opening or vacating judgments

Neighbors, who intervened at trial court level in developer's certiorari action for review of Board of Adjustment order affirming setback determination under conservation overlay district designation, did not seek relief from Board based on alleged newly discovered evidence that developer previously had admitted that the subject property was in a conservation overlay district, and thus, since Board never addressed the extent to which the information in question justified granting any sort of relief, record did not contain any ruling by the Board which the trial court could have reviewed in accordance with the applicable standard of review and neighbors were not entitled to relief from judgment based on newly discovered evidence. Bailey and Associates, Inc. v. Wilmington Bd. of Adjustment, 2010, 2010 WL 355694. Zoning and Planning ⇐ 572

Chapter 1C

Enforcement of Judgments

Article 16

Exempt Property

§ 1C–1601. What property exempt; waiver; exceptions

Notes of Decisions

1.5. Construction with bankruptcy law

Chapter 13 debtor-husband who had resided in North Carolina for the requisite 730-day period prior to commencement of his and his wife's joint case was required, based on opt-out provision of North Carolina law, to claim only North Carolina exemptions, just as his wife, who had not resided in North Carolina for the requisite 730-day period, was required to claim only federal bankruptcy law exemptions due to fact that Florida, the state in which she had resided for 180 days prior to start of this 730-day period, barred nonresidents from claiming exemptions under its laws; fact that debtor-wife was claiming federal, and debtor-husband was claiming state, law exemptions did not violate Bankruptcy Code provision prohibiting debtors in joint cases from "electing" exemptions under separate federal and state schemes, as there had been no such "election" of exemptions by debtors, each of whom was statutorily deprived of any choice in

matter. In re Connor, 2009, 419 B.R. 304. Bankruptcy ⇦ 2762.1; Bankruptcy ⇦ 2763; Bankruptcy ⇦ 2764

17.5. Individual retirement accounts

State, rather than federal, law governed resolution of issue of whether exemption of Individual Retirement Accounts (IRA) from claims of judgment creditors applied to funds withdrawn from judgment debtor's IRAs before he reached age of 59 1/2, as statute exempting individual retirement plans as defined in Internal Revenue Code and any plan treated in same manner as an individual retirement plan under Internal Revenue Code only referenced the Internal Revenue Code to clarify what retirement accounts were covered by creditor exemption. Kinlaw v. Harris, 2009, 2009 WL 5174092. Exemptions ⇦ 2

Statute exempting from claims of creditors individual retirement plans as defined in the Internal Revenue Code and any plan treated in same manner as individual retirement plan under Internal Revenue Code exempted judgment debtor's individual retirement accounts (IRA) and his legal use of funds contained within those IRAs, including his withdrawals from IRAs prior to reaching age 59 1/2, from judgment creditor, as judgment debtor's right to withdraw funds from his IRAs was not "unrestricted," in that early withdrawal of funds from IRAs, when not covered by one of the exceptions created by Congress, was discouraged by substantial early withdrawal penalty, and exemption statute contained no language evincing legislative intent to treat withdrawals from IRAs differently than funds held in IRAs. Kinlaw v. Harris, 2009, 2009 WL 5174092. Exemptions ⇦ 49

Chapter 1D

Punitive Damages

§ 1D–30. Bifurcated trial

Notes of Decisions

1. In general

The general rule is that the compensatory and punitive damages claims are to be tried at the same time, before the same jury, but there is a statutory procedure for bifurcating the compensatory damages phase of the trial from the punitive damages phase of the trial, and under such procedure liability for compensatory damages must first be determined before evidence relating solely to punitive damages can be presented to the jury; this procedure is only applicable if a defendant makes a motion for bifurcation pursuant to this statute. Land v. Land, 2010, 2010 WL 59251.

Trial court did not act outside its discretion by releasing jury at conclusion of liability phase of trial that had been bifurcated on defendants' motion made pursuant to general rule of civil procedure governing separate trials, even though the verdict included finding that defendants were liable for punitive damages and statute governing motions for bifurcation to try punitive and compensatory damages separately required that the issues be determined by same trier of fact; since defendants' motion for bifurcation was not made pursuant to statute governing bifurcation of damages, but rather was made to separate issues of liability and damages for economy of discovery, trial court was not required to have the issues heard by same trier of fact. Land v. Land, 2010, 2010 WL 59251.

When a motion to bifurcate is pursuant to statute governing bifurcation of issues of compensatory and punitive damages, then the trial court is obliged to follow the procedures set forth in that statute; however, where the motion to bifurcate is made under the more general provision of rules of civil procedure regarding separate trials, the trial court is not so bound. Land v. Land, 2010, 2010 WL 59251.

§ 1D–45. Frivolous or malicious actions; attorneys' fees

Notes of Decisions

3. Review

Lot owners did not cite any legal authority in support of argument on appeal that no basis existed under any statute or Rule of Civil Procedure for such an award of attorney fees to homeowners association for successful motion to dismiss lot owners' punitive damages claim, and thus issue did not warrant appellate review. Moss Creek Homeowners Ass'n, Inc. v. Bissette, 2010, 2010 WL 356195. Appeal and Error ⇦ 756

Chapter 6

Liability for Court Costs

Article 3

Civil Actions and Proceedings

§ 6–19.1. Attorney's fees to parties appealing or defending against agency decision

Notes of Decisions

Final disposition 2.5
Petition for fees 3.5

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1. In general

Plain language of statute that allows court to award reasonable attorney fees to prevailing party in review of administrative agency action requires a prevailing party seeking recovery of attorney fees to petition for them. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. States ⇦ 215

1.5. Purpose

General Assembly enacted statute that allowed court to award reasonable attorney fees to prevailing party in review of administrative agency action in order to curb unwarranted, ill-supported suits initiated by State agencies. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. States ⇦ 215

2. Jurisdiction

Trial court had jurisdiction to award attorney fees to trucking company, under statute that allowed court to award reasonable attorney fees to prevailing party in review of administrative agency action, on its appeal of overweight ticket issued by Department of Crime Control and Public Safety, although trucking company did not petition for attorney fees; final disposition had not occurred, and, thus, lack of petition was not an obstacle to company's ability to seek attorney fees, and court had jurisdiction to award attorney fees before final disposition since it was reviewing ticket de novo. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. Automobiles ⇦ 15

2.5. Final disposition

"Final disposition," for purposes of statute that allows court to award reasonable attorney fees to prevailing party in review of administrative agency action, is such a conclusive determination of the subject-matter that after the award, judgment, or decision is made, nothing further remains to fix the rights and obligations of the parties and no further controversy or litigation can arise thereon. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. States ⇦ 215

"Final disposition" under statute that allowed court to award reasonable attorney fees to prevailing party in review of administrative agency action had not occurred in review of overweight ticket issued to trucking company by Department of Crime Control and Public Safety; final disposition would not occur until state Supreme Court either declined to grant discretionary review or until any proceedings resulting from Supreme Court review had concluded. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. Automobiles ⇦ 15

3. Time for application

Filing period for petition under statute that allows court to award reasonable attorney fees to prevailing party in review of administrative agency action begins to run after decision has become final and it is too late to appeal. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. States ⇦ 215

3.5. Petition for fees

Requests in complaint and motion for summary judgment for attorney fees were not "petition" for such fees; filings did not constitute type of formal petition envisioned by statute that allowed court to award reasonable attorney fees to prevailing party in review of administrative decision. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. States ⇦ 215

5. Substantial justification

Claim has substantial justification within the meaning of statute that allows court to award reasonable attorney fees to prevailing party in review of administrative agency action when it is justified in substance or in the main, that is, when it is justified to a degree that could satisfy a reasonable person. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. States ⇦ 215

Substantial justification standard for claims by state agencies should not be so strictly interpreted as to require agency to demonstrate infallibility of each suit it initiates in order to avoid paying attorney fees to prevailing party; similarly, standard should not be so loosely interpreted as to require agency to demonstrate only that suit is not frivolous, for that is assuredly not the standard for government litigation of which a reasonable person would approve. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. States ⇦ 215

In deciding whether a State agency has pressed a claim against a party without substantial justification, the law and facts known to, or reasonably believed by, the State agency at the time the claim is pressed must be evaluated. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. States ⇦ 215

12. Review

Department of Crime Control and Public Safety was substantially justified in issuing overweight penalty to trucking company based on difference between actual weight of tractor trailer and statutory maximum, and, thus, trial court erred by reaching contrary conclusion in awarding attorney fees to company, although actual weight of truck did not violate weight limit specified in special permit; Department's construction of relevant statutory language had some level of support, and precedent which held otherwise was issued after penalty was imposed. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. Automobiles ⇐ 15

13. —— Scope of review, review

Trial court's consideration of overweight ticket issued to trucking company was de novo review, although statute that allowed aggrieved person to seek review did not explicitly provide for de novo review, and, thus, trial court could consider issue of attorney fees before final disposition occurred; literal language of statute authorized aggrieved person who believed he or she had any defenses to assessment to sue for amount so demanded without providing any indication that resulting litigation differed in any way from ordinary civil litigation. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. Automobiles ⇐ 15

Appellate courts are required to consider the entire record in determining whether there was substantial justification for the agency's action that would allow award of attorney fees to prevailing party. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. States ⇐ 215

§ 6–21.2. Attorneys' fees in notes, etc., in addition to interest

Notes of Decisions

2. Construction and application

Statute allowing attorney fees in suits on notes is a remedial statute and should be construed liberally. Telerent Leasing Corp. v. Boaziz, 2009, 686 S.E.2d 520. Bills and Notes ⇐ 534

5. Discretion of lower court

Trial court acted within its discretion in awarding $92,208.76 in attorney fees on a $421,680.67 verdict against lessee in an action that a lessor of hotel electronics equipment brought to collect on a deficiency in the amount owed under the parties' lease agreement, despite lessee's contention that the amount was in violation of the 15% cap in statute allowing attorney fees in suits on notes; fees lessor expended in the hotel bankruptcy proceedings were reasonably related to collection on the agreements, the lease agreements provided that lessee was responsible to lessor for "reasonable" attorney fees, and considering the balance of the debt collected in both the bankruptcy proceeding and the current deficiency action, the fee awarded fell below the 15% cap. Telerent Leasing Corp. v. Boaziz, 2009, 686 S.E.2d 520. Costs ⇐ 194.34

Chapter 7A

Judicial Department

Subchapters I through VII appear in this volume.

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE

Article 5

Jurisdiction

§ 7A–27. Appeals of right from the courts of the trial divisions

Notes of Decisions

2. Appellate jurisdiction—In general

The Court of Appeals had jurisdiction to hear defendant's appeal of order granting the State's petition for satellite-based monitoring (SBM) of defendant; the order requiring defendant to submit to SBM for the rest of his natural life was a final judgment, and statute granted appellate jurisdiction over appeals from final judgments of the superior court. State v. Singleton, 2010, 2010 WL 59255. Mental Health ⇐ 469(6)

36. —— Motion for new trial or in arrest of judgment, judgments or orders

Language in procedural rules permitting immediate appeal from an order denying a new trial did not apply to denial of new trial only as to liability phase of bifurcated trial, in which trial an order was entered finding defendants liable but in which trial the issue of damages had yet to be decided, and therefore, defendants seeking appeal from the

interlocutory order were required to show that a substantial right was affected. Land v. Land, 2010, 2010 WL 59251.

64. —— Statutory exceptions to interlocutory orders reviewable

Language in procedural rules permitting immediate appeal from an order denying a new trial did not apply to denial of new trial only as to liability phase of bifurcated trial, in which trial an order was entered finding defendants liable but in which trial the issue of damages had yet to be decided, and therefore, defendants seeking appeal from the interlocutory order were required to show that a substantial right was affected. Land v. Land, 2010, 2010 WL 59251.

77. —— Test of substantial rights affected

For purposes of whether a judicial order is immediately appealable, a right is "substantial" when it will clearly be lost or irremediably and adversely affected if the order is not reviewed before final judgment. Asheville Jet, Inc. v. City of Asheville, 2010, 2010 WL 309458.

The "substantial right" test for appealability is more easily stated than applied; it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Asheville Jet, Inc. v. City of Asheville, 2010, 2010 WL 309458.

86. —— Single or multiple trial potential, substantial rights affected

The possibility that defendants may be required to defend two "trials" on the same issues does not create a per se right to immediate appeal of an interlocutory order; ordinarily the possibility of undergoing a second trial affects a "substantial right" only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue. Asheville Jet, Inc. v. City of Asheville, 2010, 2010 WL 309458.

Claims asserted and remedies sought by plaintiff operating as Fixed Based Operator (FBO) at regional airport, as against regional airport authority and city, in Federal Aviation Administration (FAA) proceedings and in state court, were so dissimilar that no factual or issue determination made in one would be binding on the other, and therefore, there was not a possibility of prejudice to airport authority or city from inconsistent "verdicts," and no "substantial right" was affected to warrant immediate appeal from state trial court's denial of motions to dismiss; to the extent, if any, that state trial court's ruling encroached on the FAA's exclusive jurisdiction concerning grant assurances relevant to the case, the state court disposition could not bind the FAA in its proceeding. Asheville Jet, Inc. v. City of Asheville, 2010, 2010 WL 309458.

91.5. —— Interlocutory orders, substantial rights affected

Fact that a second jury would decide issue of damages after first jury decided liability as against defendants in business court action, did not affect a "substantial right" of defendants so as to permit immediate appeal from the interlocutory order entered on their liability; defendants moved for and obtained bifurcated trial over plaintiffs' objections, and the issues decided in the two trials were separate and distinct such that there was no possibility of inconsistent verdicts. Land v. Land, 2010, 2010 WL 59251.

160. —— Right to appeal, interlocutory orders

Although an interlocutory order regarding discovery matters is generally not immediately appealable, when a party asserts a statutory privilege, which directly relates to the matter to be disclosed under the order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right and thus is immediately appealable. North Carolina State Bd. of Dental Examiners v. Woods, 2010, 2010 WL 313556. Appeal and Error ⇦ 70(4)

173. —— Discovery orders, interlocutory orders

Trial court's interlocutory order granting Board of Dental Examiners' motion to enforce investigative panel's subpoenas for dentist's patient records in Board's disciplinary investigation affected a substantial right and thus was subject to immediate appellate review; dentist asserted statutory privilege based on HIPAA. North Carolina State Bd. of Dental Examiners v. Woods, 2010, 2010 WL 313556. Health ⇦ 223(1)

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE

ARTICLE 11

Special Regulations

§ 7A–97. Court's control of argument

Notes of Decisions

27. —— Criminal cases, generally, law statements

The trial court's refusal to allow defense counsel to argue the defense of mistake of age to the jury did not constitute reversible error, in prosecution for taking indecent liberties with a child; mistake of age was not a valid defense to the charge of taking indecent liberties with a child. State v. Breathette, 2010, 2010 WL 702446. Criminal Law ⇐ 2086; Infants ⇐ 13

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT

ARTICLE 28

Uniform Costs and Fees in the Trial Divisions

§ 7A–306. Costs in special proceedings

Notes of Decisions

Witness fees 3

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3. Witness fees

Trial court properly required the payment from ward's estate of witness fees associated with special needs trust (SNT) trustee's compliance with a subpoena issued by counsel for ward and her husband following restoration of competency to ward. In re Clark, 2010, 2010 WL 348263. Mental Health ⇐ 233

Chapter 7B

Juvenile Code

SUBCHAPTER I. ABUSE, NEGLECT, DEPENDENCY

Article 1

Purposes; Definitions

§ 7B–101. Definitions

Notes of Decisions

11. Sufficiency of evidence

Record in child neglect proceeding was insufficient to establish that maternal grandmother had standing to pursue appeal of disposition as a custodian of the child; evidence did not establish that grandmother had ever been awarded legal custody of child, and there was no evidence that clarified whether child's living arrangement with grandmother was intended to be temporary or permanent, or its duration, as required for custodian status. In re T.B., 2009, 685 S.E.2d 529. Infants ⇐ 242

Article 2

Jurisdiction

§ 7B–200. Jurisdiction

Notes of Decisions

5. Custody jurisdiction

Trial court order placing child, who was adjudicated dependent and neglected, in the custody of maternal grandmother, and divesting county department of social services of custody, which order stated "case closed" at its conclusion, did not "terminate" trial court's subject matter jurisdiction over the case, and trial court was not precluded from later acting upon the department's motion to reassume custody; after the order placing child in custody of maternal grandmother, neither mother nor father were returned to their pre-petition legal status, and the participation of the department was not statutorily required in order for the trial court to retain jurisdiction over the child. In re S.T.P., 2010, 2010 WL 537544. Infants ⇦ 232

Trial court order placing child, who was adjudicated dependent and neglected, in the custody of maternal grandmother, and divesting county department of social services of custody, which order stated "case closed" at its conclusion, did not "terminate" trial court's subject matter jurisdiction over the case, and trial court was not precluded from later acting upon the department's motion to reassume custody; after the order placing child in custody of maternal grandmother, neither mother nor father were returned to their pre-petition legal status, and the participation of the department was not statutorily required in order for the trial court to retain jurisdiction over the child. In re S.T.P., 2010, 2010 WL 537544. Infants ⇦ 232

§ 7B–201. Retention and termination of jurisdiction

Notes of Decisions

1. Scope of jurisdiction

Trial court order placing child, who was adjudicated dependent and neglected, in the custody of maternal grandmother, and divesting county department of social services of custody, which order stated "case closed" at its conclusion, did not "terminate" trial court's subject matter jurisdiction over the case, and trial court was not precluded from later acting upon the department's motion to reassume custody; after the order placing child in custody of maternal grandmother, neither mother nor father were returned to their pre-petition legal status, and the participation of the department was not statutorily required in order for the trial court to retain jurisdiction over the child. In re S.T.P., 2010, 2010 WL 537544. Infants ⇦ 232

Article 3A

Expunction; Responsible Individuals List

§ 7B–323. Petition for expunction; district court

Notes of Decisions

Construction and application 1.5
Due process 2
Validity 1

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1. Validity

Biological father sufficiently raised constitutional challenge to Responsible Individuals List (RIL) of individuals who have allegedly abused or neglected children in his petition for expunction of his name from the RIL, as required to preserve issue for appeal; in motion to remove his name, petitioner alleged both that statute was unconstitutional on its face because the listing of his name without a prior hearing violated procedural due process rights and also that statute was unconstitutional on its face because the burden of proof failed to satisfy the minimum requirements of due process. In re W.B.M., 2010, 2010 WL 702752. Infants ⇦ 133

1.5. Construction and application

Writ of mandamus, rather than appeal, was appropriate method for biological father to protest trial court's delay in entering written order from hearing on father's petition for expunction of his name from the Responsible Individuals List (RIL) of individuals who have allegedly abused or neglected children. In re W.B.M., 2010, 2010 WL 702752. Mandamus ⇦ 4(3)

2. Due process

Inclusion on the Responsible Individuals List (RIL) of individuals who have allegedly abused or neglected children deprives an individual of the liberty interests guaranteed under the Constitution by inhibiting the individual from using his faculties to adopt, foster, and care for children, earning his

livelihood in the childcare field, or pursuing or securing employment in the childcare field. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇨ 4403; Infants ⇨ 133

Father had due process right to a pre-deprivation hearing before his name was listed on Responsible Individuals List (RIL) of individuals who have allegedly abused or neglected children; department of social services investigation into the risk was insufficient to support the loss of liberty that accompanied the listing, pre-deprivation hearing was not unduly burdensome in proportion to the liberty interest at stake, and state's goal of protecting children could be fulfilled by other means. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇨ 4403; Infants ⇨ 133

Due process requires the State, in a pre-deprivation hearing, to substantiate a report of child abuse or neglect by a preponderance of the evidence before an individual's name can be included in and disseminated from the Responsible Individuals List (RIL) of individuals who have allegedly abused or neglected children; the director of the department of social services has the burden of proving abuse or serious neglect and identifying the responsible individual by a preponderance of the evidence. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇨ 4403; Infants ⇨ 133

Article 9

Dispositions

§ 7B–907. Permanency planning hearing

Notes of Decisions

2. Construction and application

Where the trial court fails to adhere to statutory time lines with respect to issuance of juvenile permanency planning review order, mandamus is an appropriate and more timely alternative than an appeal. In re E.K., 2010, 2010 WL 348398.

9. Review

Trial court failed to adhere to statutory time lines when issuing juvenile permanency planning review order, and the proper remedy for Department of Social Services (DSS) was to file a petition for writ of mandamus during the delay, rather than raise the issue after additional delay on appeal; only five substantive hearings occurred over the four years that the juveniles were in foster care, and all of those hearings occurred outside of the time frames mandated by the Juvenile Code. In re E.K., 2010, 2010 WL 348398.

Article 10

Modification and Enforcement of Dispositional Orders; Appeals

§ 7B–1001. Right to appeal

Notes of Decisions

½. Construction and application

An appeal may be taken from an order of disposition following an adjudication of child neglect, abuse, or dependency, but only certain parties may pursue such an appeal. In re T.B., 2009, 685 S.E.2d 529. Infants ⇨ 242

§ 7B–1002. Proper parties for appeal

Notes of Decisions

Standing 2

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1. Construction and application

A parent, appointed guardian, or custodian who is a non-prevailing party may bring an appeal following an adjudication of child neglect, abuse, or dependency. In re T.B., 2009, 685 S.E.2d 529. Infants ⇨ 242

2. Standing

Record in child neglect proceeding was insufficient to establish that maternal grandmother had standing to pursue appeal of disposition as a custodian of the child; evidence did not establish that grandmother had ever been awarded legal custody of child, and there was no evidence that clarified whether child's living arrangement with grandmother was intended to be temporary or permanent, or its duration, as required for custodian status. In re T.B., 2009, 685 S.E.2d 529. Infants ⇨ 242

Maternal grandmother was not non-prevailing party, in child neglect proceedings, as required to confer standing to pursue appeal of disposition; trial court granted maternal grandmother's requests that paternal grandmother and her husband not be awarded permanent physical custody and

that she be granted visitation privileges. In re T.B., 2009, 685 S.E.2d 529. Infants ⇐ 242

Article 11

Termination of Parental Rights

§ 7B–1101. Jurisdiction

Notes of Decisions

Waiver 6

1. Jurisdiction—In general

In neglect and dependency proceedings, a court's subject matter jurisdiction is conferred by statute. In re N.E.L., 2010, 2010 WL 537615. Infants ⇐ 196

6. Waiver

Mother's participation in termination of parental rights action waived any objection to personal jurisdiction based on improper service of summons, and thus trial court had jurisdiction over mother, where mother filed an answer to the termination petition, appeared, presented evidence, and was represented by counsel without objecting to personal jurisdiction. In re N.E.L., 2010, 2010 WL 537615. Infants ⇐ 198

§ 7B–1103. Who may file a petition or motion

Notes of Decisions

7. Jurisdiction

Mother's general appearance at non-secure custody hearings resulted in waiver of any objection to personal jurisdiction in neglect and dependency action, and thus trial court had jurisdiction over the action and issued a valid custody order to Department of Social Services (DSS), which gave DSS standing to file petition for termination of parental rights; although summonses were issued one day after juvenile petitions were filed, mother was not served until after their expiration. In re S'N.A.S., 2009, 2009 WL 5067401.

§ 7B–1106. Issuance of summons

Notes of Decisions

Waiver 5

5. Waiver

Child, through his guardian ad litem, waived any challenge based on lack of summons to trial court's exercise of personal jurisdiction in termination of parental rights action; although neither child nor guardian received summons, guardian fully participated in the termination of parental rights hearing by filing a report and by appearing, via counsel, at hearing. In re N.E.L., 2010, 2010 WL 537615. Infants ⇐ 198

§ 7B–1109. Adjudicatory hearing on termination

Notes of Decisions

19. Consolidated hearings

Trial court considering petition to terminate parental rights was not required to conduct separate adjudication and disposition hearings, so long as court applied the appropriate evidentiary standards in each stage of the proceedings. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇐ 203

So long as the court applies the different evidentiary standards at each of the two stages of a termination of parental rights action, there is no requirement that the stages be conducted at two separate hearings. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇐ 203

§ 7B–1110. Determination of best interests of the juvenile

Notes of Decisions

3. Stages of termination proceedings

The termination of parental rights is a two-step process; during the initial adjudication phase of the trial, the petitioner seeking termination must show by clear, cogent, and convincing evidence that grounds exist to terminate parental rights, and if the trial court determines that a ground for termination exists, the court moves to the disposition stage, where it must determine whether termination is in the best interest of the child. In re S.T.P., 2010, 2010 WL 537544. Infants ⇐ 155; Infants ⇐ 178; Infants ⇐ 194.1

If the petitioner meets the burden of proving that grounds for termination of parental rights exist, the trial court moves to the disposition phase and must determine whether termination of parental rights is in the best interests of the child. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇐ 155; Infants ⇐ 210

Trial court considering petition to terminate parental rights was not required to conduct separate adjudication and disposition hearings, so long as court applied the appropriate evidentiary standards in each stage of the proceedings. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇐ 203

So long as the court applies the different evidentiary standards at each of the two stages of a termination of parental rights action, there is no requirement that the stages be conducted at two separate hearings. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇐ 203

5. Abuse of discretion

Upon review of a trial court order terminating parental rights to a child, the Court of Appeals will consider, based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child. In re S.T.P., 2010, 2010 WL 537544. Infants ⇐ 251

The Court of Appeals reviews the trial court's decision to terminate parental rights for abuse of discretion; a trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇐ 251

12. Review

Trial court considered statutory factors, and acted within its discretion in terminating mother's parental rights based on the best interest of child, who had been born out of wedlock and adjudicated dependent and neglected; child had been in county custody for over two years at time of termination hearing, mother was unable to meet her needs or child's needs, mother was unable to complete substance abuse treatment, as were maternal grandmother and father, and could not maintain sobriety, the issues that led to the out-of-home placement had not been corrected, child had unique emotional and developmental needs, child was in need of a stable and permanent environment, and adoptive placement could meet the child's needs. In re S.T.P., 2010, 2010 WL 537544. Infants ⇐ 155

§ 7B–1111. Grounds for terminating parental rights

Notes of Decisions

I. IN GENERAL

7. Burden of proof

During the adjudication stage, the petitioner seeking termination of parental rights has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination exist. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇐ 155; Infants ⇐ 178

If the petitioner meets the burden of proving that grounds for termination of parental rights exist, the trial court moves to the disposition phase and must determine whether termination of parental rights is in the best interests of the child. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇐ 155; Infants ⇐ 210

14.5. Remand

Trial court's findings of fact were insufficient to support termination of parental rights on statutory grounds that parents failed to show reasonable progress in correcting conditions which led to children's removal, and thus remand was required for additional findings; while it was undisputed that children had been removed from home for 31 months and that parents failed to take any corrective steps for the first 18 months following the removal, court did not address any incidents which occurred 13 months preceding the date of the filing of the termination petition or whether parents' progress was reasonable, but only discuss incidents that occurred in the first 18 months. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇐ 178; Infants ⇐ 210; Infants ⇐ 254

17. Discretion of court

The Court of Appeals reviews the trial court's decision to terminate parental rights for abuse of discretion; a trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇐ 251

II. GROUNDS FOR TERMINATION

41. Sufficiency of evidence, generally, grounds for termination

Evidence in termination of parental rights action was insufficient to support trial court's determination that grounds for termination existed based on

willful abandonment for six consecutive months immediately preceding the filing of the petition; while children had been removed from home for 31 months and parents failed to pay child support on a regular basis, parents visited with children at least one a month and brought toys and clothes when the visited. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇦ 157

46. Abandonment or absence of parent, grounds for termination

Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence in a termination of parental rights action. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⇦ 157

SUBCHAPTER II. UNDISCIPLINED AND DELINQUENT JUVENILES

Article 17

Screening of Delinquency and Undisciplined Complaints

§ 7B–1703. Evaluation decision

Notes of Decisions

2. Jurisdiction

Where county clerk of court's officer received juvenile delinquency petitions charging defendant more than 30 days after the court counselor approved the petitions for filing, the juvenile court established no jurisdiction, and could not transfer jurisdiction to superior court, thus requiring vacatur of convictions. State v. Smith, 2010, 2010 WL 309902. Infants ⇦ 68.7(1); Infants ⇦ 68.8; Infants ⇦ 197

Article 21

Law Enforcement Procedures in Delinquency Proceedings

§ 7B–2101. Interrogation procedures

Notes of Decisions

3. Custody

Juvenile, who was questioned by law enforcement officers at school, was not in "custody" for purposes of *Miranda* and statute setting forth procedures for juvenile interrogations, where juvenile was escorted from class and into a conference room by a uniformed school resource officer, the room door was closed but not locked, juvenile only began speaking to an investigator after agreeing to answer questions, juvenile's responses and questions indicated that he understood that he did not need to answer questions, that he was not under arrest, and that the matter was still going to court, and juvenile left when the school bell rang. In re J.D.B., 2009, 686 S.E.2d 135. Infants ⇦ 174

4. Admissibility of evidence

Error in trial court's admission of juvenile's statements to a law enforcement officer, which were made after juvenile was erroneously advised of his statutory right to have a parent, guardian, or custodian present during questioning, was not harmless at a delinquency proceeding on allegations of sex offenses, even though victim's statements provided evidence of a crime; juvenile entered an admission to felonious sex offense with a child only after trial court denied juvenile's motion to suppress, nothing indicated that any physical evidence or expert testimony was offered by the state, and juvenile's statements provided much more evidence of guilt than victim's statements. In re M.L.T.H., 2009, 685 S.E.2d 117. Infants ⇦ 253

6. Waiver of rights—In general

Juvenile did not knowingly, willingly, and understandingly waive his statutory right to have a parent, guardian, or custodian present at an interview with a law enforcement officer, and thus juvenile's statements during the interview were inadmissible at a delinquency proceeding; juvenile was erroneously informed that he had the right to have any person present during questioning, juvenile chose his 21-year-old brother, who was not juvenile's parent, guardian, or custodian, and there was no way to know whether the juvenile, had he been correctly advised of his right, would have waived his rights and talked to the officer alone or whether he would have asked for one of his parents. In re M.L.T.H., 2009, 685 S.E.2d 117. Infants ⇦ 174

Article 24

Hearing Procedures

§ 7B–2405. Conduct of the adjudicatory hearing

Notes of Decisions

1. Construction and application

Generally, a juvenile in an adjudication hearing has all rights afforded adult offenders. In re D.K., 2009, 684 S.E.2d 522. Infants ⇐ 191

§ 7B–2409. Quantum of proof in adjudicatory hearing

Notes of Decisions

3. Appeal and error

Trial court erred by stating ambiguously in juvenile delinquency adjudication order which standard of proof it utilized when making finding that juvenile committed larceny; in written adjudication order, trial court found that facts had "been proven beyond a reasonable doubt," but also noted that state had "shown by clear and convincing evidence" that juvenile committed larceny. In re D.K., 2009, 684 S.E.2d 522. Infants ⇐ 210

4. Findings

Apparent application of conflicting burdens of proof required new trial in juvenile delinquency adjudication, as trial judge had been appointed to the superior court bench and was unavailable to make required findings as to standard of proof upon remand. In re D.K., 2009, 684 S.E.2d 522. Infants ⇐ 254

Article 26

Modification and Enforcement of Dispositional Orders; Appeals

§ 7B–2602. Right to appeal

Notes of Decisions

2. Timely appeal

Juvenile's notice of appeal in delinquency proceeding was not timely, where juvenile gave notice of appeal in open court prior to entry of the court's final written order, and filed no notice of appeal after the court's final written order. In re D.K.L., 2009, 2009 WL 5174290. Infants ⇐ 244.1

Notice of appeal from an order denying juvenile's motion to suppress in a delinquency proceeding was not timely filed, and thus the appellate court lacked jurisdiction to consider the appeal, even though no disposition was made within 60 days after entry of the order, and juvenile therefore had 70 days after entry of the order to file a written notice of appeal, where juvenile filed the notice of appeal 85 days after the order was entered. In re M.L.T.H., 2009, 685 S.E.2d 117. Infants ⇐ 244.1

2.5. Interlocutory appeals

An adjudication of delinquency is not a final, appealable order. In re D.K.L., 2009, 2009 WL 5174290. Infants ⇐ 242

An adjudication of delinquency is not a final order, and no appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency. In re M.L.T.H., 2009, 685 S.E.2d 117. Infants ⇐ 242

Chapter 8

Evidence

Article 7

Competency of Witnesses

§ 8–50.1. Competency of blood tests; jury charge; taxing of expenses as costs

Notes of Decisions

4. Right to demand test

Mother was not entitled to DNA testing of putative father on her motion for proof of paternity filed over five years after putative father's paternity was established judicially by a trial court order determining he was child's biological father, where mother never appealed or sought relief from that order. Helms v. Landry, 2009, 686 S.E.2d 674. Children Out–Of–Wedlock ⇦ 68

Chapter 8C

Evidence Code

Article 2

Judicial Notice

Rule 201. Judicial notice of adjudicative facts

Notes of Decisions

1. Construction and application

A fact is considered "indisputable" and, thus, subject to judicial notice if it is so well established as to be a matter of common knowledge; conversely, a court cannot take judicial notice of a disputed question of fact. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Evidence ⇦ 5(1)

43. —— Judges, courts and judicial proceedings

In proceeding initiated by mother for entry of domestic violence protection order (DVPO) against father of her child, trial court could not take judicial notice of testimony previously presented in father's criminal trial arising from the domestic violence; the facts were disputed quite vigorously in the criminal trial, and trial court could take judicial notice only of facts that were not subject to reasonable dispute. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 59

Article 4

Relevancy and Its Limits

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Notes of Decisions

2. Discretion of court— In general

Whether to exclude evidence on the basis that the probative value of the evidence was outweighed by its prejudicial effect is a matter within the sound discretion of the trial court, and the court's ruling may be reversed on appeal only upon a showing that it could not have been the result of a reasoned decision. State v. Fortney, 2010, 2010 WL 59252. Criminal Law ⇦ 338(7); Criminal Law ⇦ 1153.3

55. —— Balancing test, photographs

In determining whether to admit photographic evidence in criminal prosecution, trial court must weigh probative value of photographs against danger of unfair prejudice to the defendant. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⇦ 438(7)

64.5. —— Review, photographs

Probative value of four photographs of deceased victims at crime scene was not substantially outweighed by danger of unfair prejudice, confusion of

issues, or misleading jury, and thus were admissible, in prosecution for murder and robbery with dangerous weapon; defendant did not object to other 23 photographs of crime scene, and four he did object to depicted different perspectives of crime scene and focused on different pieces of evidence, state made use of photographs in conjunction with testimony for illustrative purposes only, and photographs were not used to inflame jury's passions. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⇐ 438(7)

82.5. —— Review, other offenses

Trial court admission of defendant's conviction for felony rape did not unfairly prejudice defendant, in prosecution for possession of a firearm by a felon, even though defendant offered to stipulate to the prior conviction; defendant's prior conviction was not substantially similar to the charged offense. State v. Fortney, 2010, 2010 WL 59252. Criminal Law ⇐ 661

135. Review

Appellate court reviews a trial court's decision to admit or exclude evidence in criminal prosecution on grounds of prejudice, confusion, or waste of time for abuse of discretion, which results when trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been result of reasoned decision. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⇐ 1153.3

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

Notes of Decisions

198. —— Error, review

Any error by trial court at trial for possession and sale of cocaine in allowing detective to testify that he knew defendant "personally as a drug dealer" did not prejudice defendant in light of testimony and evidence that defendant did actually sell cocaine to deputy, and thus was not plain error. State v. Batchelor, 2010, 2010 WL 702763. Criminal Law ⇐ 1036.1(8)

Article 6

Witnesses

Rule 609. Impeachment by evidence of conviction of crime

Notes of Decisions

24. —— Cross examination, examination of witnesses

The trial court erred when it allowed the prosecutor to cross-examine defendant concerning a prior guilty plea to a lesser charge that was part of a plea bargain, in prosecution for first degree burglary; statute provided that the fact that a defendant had engaged in plea discussion or made a plea agreement could not be received into evidence in any criminal or civil action. State v. Riley, 2010, 2010 WL 348261.

Article 7

Opinions and Expert Testimony

Rule 701. Opinion testimony by lay witness

Notes of Decisions

5. Opinions of lay witnesses—Foundation

Officer's testimony that the "white crystal powdery-type substance" found on vehicle in which murder victims were discovered "looked like" unrinsed carwash suds did not require compliance with rule governing admission of opinion testimony by lay witnesses; testimony was not an opinion that defendant attempted to wash the vehicle without rinsing it, but rather explained officer's observations about the size and distribution of the spots found on the vehicle. State v. Williams, 2009, 686 S.E.2d 493. Criminal Law ⇐ 459

7. —— Subjects of opinion evidence, opinions of lay witnesses

Officer's lay opinion testimony identifying defendant as person depicted in video surveillance footage was inadmissible as officer was in no better position than jury to identify defendant as person in surveillance video. State v. Belk, 2009, 2009 WL 5174093.

11. —— Perceptions of witness, opinions of lay witnesses

Officer's testimony regarding his opinion that murder victims were not shot in the vehicle in which they were found was proper lay opinion testimony in murder prosecution; opinion was rationally based on officer's perception, location of

murders was a key issue linking defendant to the crime, and officer's opinion was helpful to the determination of a fact of the case. State v. Williams, 2009, 686 S.E.2d 493. Criminal Law ⇦ 459; Criminal Law ⇦ 465

Officer's testimony regarding his opinion that murder victim had been "winched in" the vehicle in which he was found by use of a rope found inside the vehicle was proper lay opinion testimony in murder prosecution; testimony was based upon officer's perception of blood patterns and the positioning of and tension on the rope on the seat and victim's hands, and testimony was helpful in determining how defendant, acting alone, would have been able to move victim's large body from defendant's residence to the vehicle. State v. Williams, 2009, 686 S.E.2d 493. Criminal Law ⇦ 459; Criminal Law ⇦ 465

Rule 702. Testimony by experts

Notes of Decisions

I. IN GENERAL

11. —— Discretion of trial court, competency of expert

A trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion. State v. Meadows, 2010, 2010 WL 59214. Criminal Law ⇦ 1153.12(2); Criminal Law ⇦ 1153.12(3)

28. Subjects of expert testimony—In general

To determine whether an expert's area of testimony is considered sufficiently reliable, a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two. State v. Meadows, 2010, 2010 WL 59214. Criminal Law ⇦ 486(2)

57. —— Scientific evidence generally, admissibility as expert testimony

The trial court faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques should generally focus on the following nonexclusive indices of reliability to determine whether an expert's proffered scientific or technical method of proof is sufficiently reliable: the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting the scientific hypotheses on faith, and independent research conducted by the expert. State v. Meadows, 2010, 2010 WL 59214. Criminal Law ⇦ 486(2)

66. —— Drug investigation and identification, admissibility as expert testimony

Evidence, including witness testimony that chemical analysis machine was reliable based upon witness's personal experience of using the machine and the fact that some of the test results had been confirmed by the manufacturer, did not establish the reliability of the machine; machine was not an "established technique," evidence did not describe the method of analysis the machine used or how it worked but simply established that the machine used "fluorescence" to determine what the substance was and printed out a result, witness did not have any relevant professional background in the field of chemical analysis of controlled substances and did not testify as to any independent research he conducted, and state did not present any evidence independent of information from the manufacturer which would establish the machine's reliability. State v. Meadows, 2010, 2010 WL 59214. Criminal Law ⇦ 488

Article 8

Hearsay

Rule 801. Definitions and exception for admissions of a party-opponent

Notes of Decisions

3. Confrontation rights

Hearsay statements may violate the Sixth Amendment right to confrontation if offered for their truth. State v. Batchelor, 2010, 2010 WL 702763. Criminal Law ⇦ 662.8

20. —— Evidence offered not to prove truth of matter asserted, nature and admissibility of hearsay evidence

Deputy's testimony regarding controlled drug buy at car wash, including that he was riding around with an informant attempting to locate persons known to sell controlled substances and that informant recognized someone at car wash, and testimony regarding what deputy wrote on the after-action report, was not offered to prove that defendant was a drug dealer but rather was offered to explain deputy's presence at car wash and why he was doing what he did, and thus testimony was not hearsay and did not violate defendant's Confrontation Clause rights. State v. Batchelor, 2010, 2010 WL 702763. Criminal Law ⇦ 419(3); Criminal Law ⇦ 662.8

Out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. State v. Hough, 2010, 2010 WL 702458.

37. —— Declarations against interest, admissions of party-opponent

Alleged hearsay testimony that mother told Department of Social Services (DSS) that father was still drinking and hitting her, that she had kicked father, that she got a knife, and that she had a relationship with another man was admissible against mother as an admission in termination of parental rights action. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⚿ 174

118. Opinion evidence

Forensic chemist's testimony concerning controlled substances seized at defendant's residence was not hearsay, although it was based, in part, on laboratory reports generated by another expert, as reports were not offered for the truth of the matter asserted. State v. Hough, 2010, 2010 WL 702458.

122. Objections and exceptions

Neither mother nor father objected at trial on hearsay grounds to testimony in termination of parental rights action that mother told Department of Social Services (DSS) that father was still drinking and hitting her, that she had kicked father, that she got a knife, and that she had a relationship with another man, and thus any objection to the testimony on hearsay grounds on appeal was waived. In re F.G.J., 2009, 684 S.E.2d 745. Infants ⚿ 243

124. —— Reception of hearsay, harmless and prejudicial error

In prosecution for common law robbery, among other offenses, trial court's error in admitting hearsay testimony by investigator that victim said money was removed from her clothing did not prejudice defendant, notwithstanding contention that hearsay statement was the only evidence of a taking to sustain robbery charge, where defendant admitted giving money to victim in exchange for sex and no money was found on victim when she was taken to emergency room after incident. State v. Williams, 2009, 2009 WL 5174090. Criminal Law ⚿ 1169.1(9)

Rule 803. Hearsay exceptions; availability of declarant immaterial

Notes of Decisions

21. Then existing mental, emotional or physical condition—In general

Evidence tending to show a declarant's state of mind is an exception to the hearsay rule, and this evidence is admissible when the state of mind of the declarant is relevant and its probative value is not outweighed by the potential for prejudice. State v. Hernandez, 2010, 2010 WL 348402. Criminal Law ⚿ 419(2.20)

24. —— Relevance of testimony of state of mind, then existing mental, emotional or physical condition

Hearsay testimony by murder victim's mother, that victim had told her mother that she wanted to leave defendant and that defendant was wanted for attempting to cut his baby's mama and that defendant had been stalking victim, was admissible not as a recitation of facts, but, rather, to show victim's state of mind, pursuant to state of mind hearsay exception; defendant was living with victim at her mother's home and, on the very day defendant threatened to kill victim, she told her mother that she wanted defendant to leave because he had tried to harm his baby's mother, defendant admitted to police that, the morning following these statements, he stabbed victim to death, and victim's statements indicated difficulties in the relationship prior to murder. State v. Hernandez, 2010, 2010 WL 348402. Criminal Law ⚿ 419(2.20)

71. Prejudicial and harmless error—In general

The failure of a trial court to admit or exclude evidence tending to show a declarant's state of mind, under exception to the hearsay rule, will not result in the granting of a new trial absent a showing by defendant that a reasonable possibility exists that a different result would have been reached absent the error. State v. Hernandez, 2010, 2010 WL 348402. Criminal Law ⚿ 1169.1(9); Criminal Law ⚿ 1170(1)

72. —— Reception of evidence, prejudicial and harmless error

Even if it was error for trial court to admit under "state of mind" hearsay exception testimony of victim's mother, that murder victim had told her mother she wanted to leave defendant, defendant failed to show prejudice so as to warrant grant of new trial; in his statement to police, defendant admitted that he stabbed victim after he grabbed the knife from her and snapped, defendant did not attempt to aid victim after the stabbing and, instead, fled and left her in pool of blood under a blanket, evidence against defendant was overwhelming, and there was no reasonable possibility that, absent the challenged testimony by victim's mother, the jury would have reached a different result. State v. Hernandez, 2010, 2010 WL 348402. Criminal Law ⚿ 1169.1(9)

Rule 804. Hearsay exceptions; declarant unavailable

Notes of Decisions

33. Declarations against interest, generally

State postconviction court's determination that declarant's statement that he had killed victim, made to his live-in girlfriend three weeks before his death, would not have been admissible at petitioner's murder trial under the statement against penal interest exception to North Carolina's hearsay rule was not unreasonable, and was thus entitled to deference in federal habeas proceeding. Sharpe v. Bell, 2010, 2010 WL 339044.

Article 10

Contents of Writings, Recordings and Photographs

Rule 1002. Requirement of original

Notes of Decisions

4. Best and secondary evidence—In general

Secondary evidence offered to prove the contents of a recording generally is excluded whenever the original is available. State v. Haas, 2010, 2010 WL 348260. Criminal Law ⇦ 398(2)

5. —— Availability of original, best and secondary evidence

Transcript of defendant's prior testimony at a juvenile hearing was admissible at felony child abuse trial, even if original recording was available, as there was no question as to the accuracy or authenticity of the transcript. State v. Haas, 2010, 2010 WL 348260. Criminal Law ⇦ 398(2)

11. Prejudicial or harmless error

Defendant failed to establish that any error in admitting transcript of defendant's prior testimony at juvenile hearing instead of recording was prejudicial error at felony child abuse trial; original recording had been provided to defendant and could have been offered into the evidence if defendant so desired, but defendant never offered the recording as evidence and did not request that the jury be permitted to hear the recording, there was no dispute as to the accuracy of the transcript, and defendant failed to include the recording as part of the record on appeal. State v. Haas, 2010, 2010 WL 348260. Criminal Law ⇦ 1169.1(10)

Chapter 10B

Notaries

Article 1

Notary Public Act

Part 8. Enforcement, Sanctions, and Remedies

§ 10B–60. Enforcement and penalties

Notes of Decisions

Construction and application ½
Sufficiency of evidence 1

½. Construction and application

A person may be convicted of performing "notarial acts" without a commission if that person commits one or more notarial acts with the knowledge that he or she is not a commissioned notary. State v. West, 2010, 2010 WL 537498. False Personation ⇦ 2

1. Sufficiency of evidence

Evidence was sufficient to support conviction for performing notarial acts without a commission; there was evidence that defendant was in possession of a "county notary" seal, that the county notary seal in defendant's possession matched the seal affixed to an affidavit, that the signature purportedly acknowledging the affidavit matched defendant's signature in Department of Motor Vehicle records, and that defendant was not commissioned as a notary by the Secretary of State's Office. State v. West, 2010, 2010 WL 537498. False Personation ⇦ 6

Chapter 12

Statutory Construction

§ 12–3. Rules for construction of statutes

Notes of Decisions

Singular and plural words 12.5

12.5. Singular and plural words

A person may be convicted of performing "notarial acts" without a commission if that person commits one or more notarial acts with the knowledge that he or she is not a commissioned notary. State v. West, 2010, 2010 WL 537498. False Personation ⇦ 2

A trial judge is required to instruct the jury on the law arising on the evidence. State v. West, 2010, 2010 WL 537498. Criminal Law ⇦ 770(1)

Chapter 14

Criminal Law

SUBCHAPTER I. GENERAL PROVISIONS

Article 1

Felonies and Misdemeanors

§ 14–3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, or with deceit and intent to defraud, or with ethnic animosity

Notes of Decisions

5. Assault

Ethnic animosity statute applied to defendant's assault with a deadly weapon charge, so that assault charge would be classified as a felony, even though defendant and victim were both white; there was evidence that defendant shot at victim because he was a white man in a relationship with an African-American woman, and it was possible for jury to infer that, had victim also been African-American, defendant might not have shot at him such that defendant only shot at victim because of his race and his relationship with a woman of a different race. State v. Brown, 2010, 2010 WL 537494. Criminal Law ⇦ 27

§ 14–3.1. Infraction defined; sanctions

Notes of Decisions

Review 2

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2. Review

University police officer lacked probable cause to arrest motorist for violating North Carolina law rendering it illegal to willfully and unlawfully resist, delay, or obstruct public officer in discharging or attempting to discharge duty of his office; officer arrived on scene of traffic stop and learned that another officer planned to issue motorist citation for seat belt violation, during exchange with officers, motorist repeatedly asked for officers' names and badge numbers and raised his voice, as did officers, throughout escalating verbal confrontation, motorist remained in car seat, and time between when officers approached car and when officer arrested motorist was slightly less than two minutes. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Automobiles ⇦ 349(8)

SUBCHAPTER III. OFFENSES AGAINST THE PERSON

ARTICLE 6

Homicide

§ 14–17. Murder in the first and second degree defined; punishment

Notes of Decisions

I. IN GENERAL

4. Elements of offense—In general

"First degree murder" is the unlawful killing of another human being with malice and with premeditation and deliberation. State v. Stitt, 2009, 2009 WL 5174377. Homicide ⇐ 540

7. —— Second-degree murder, elements of offense

Essential elements of second-degree murder are an unlawful killing with malice, but without premeditation or deliberation. State v. Neville, 2010, 2010 WL 309960. Homicide ⇐ 546; Homicide ⇐ 547

14. Deliberation and premeditation—In general

Killing is "premeditated," as element of first degree murder, if the defendant formed specific intent to kill victim some period of time, however short, before actual killing. State v. Stitt, 2009, 2009 WL 5174377. Homicide ⇐ 542

A killing is "deliberate," as element of first degree murder, if the defendant acted in cool state of blood, in furtherance of fixed design for revenge or to accomplish unlawful purpose and not under influence of violent passion, suddenly aroused by lawful or just cause or legal provocation. State v. Stitt, 2009, 2009 WL 5174377. Homicide ⇐ 542

Premeditation and deliberation, as elements of first degree murder, are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence. State v. Stitt, 2009, 2009 WL 5174377. Homicide ⇐ 1143

26. Felony murder—In general

A murder occurs during the perpetration of a felony, for purposes of the felony murder rule, where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction. State v. Freeman, 2010, 2010 WL 702461. Homicide ⇐ 588

31. —— Included felonies generally, felony murder

Sale or attempted sale of a controlled substance qualifies as an underlying felony, for purposes of felony murder rule, if a deadly weapon is used in its commission. State v. Freeman, 2010, 2010 WL 702461. Homicide ⇐ 600

IV. INDICTMENT OR INFORMATION

191. In general, indictment or information

Short-form first-degree murder indictment stating that defendant unlawfully, willfully, and feloniously "did of malice aforethought" kill victim, and that act was in violation of state law, notified defendant that he was being charged with first degree murder, and set forth requisite elements of that offense, and thus indictment was sufficient. State v. Stitt, 2009, 2009 WL 5174377. Indictment and Information ⇐ 19

203. Degree of offense, indictment or information

Short-form murder indictments are sufficient to charge first-degree murder on the basis of any theory, including felony murder. State v. Freeman, 2010, 2010 WL 702461. Indictment and Information ⇐ 19

204. Felony murder, indictment or information

Short-form murder indictment alleging first-degree murder put defendant on notice of a possible felony murder theory. State v. Freeman, 2010, 2010 WL 702461. Indictment and Information ⇐ 19

VI. ADMISSIBILITY OF EVIDENCE

394. Photographs, admissibility of evidence

Probative value of four photographs of deceased victims at crime scene was not substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading jury, and thus were admissible, in prosecution for murder and robbery with dangerous weapon; defendant did not object to other 23 photographs of crime scene, and four he did object to depicted different perspectives of crime scene and focused on different pieces of evidence, state made use of photographs in conjunction with testimony for illustrative purposes only, and photographs were not used to inflame jury's passions. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⇐ 438(7)

VII. SUFFICIENCY OF EVIDENCE

443. Second-degree murder, sufficiency of evidence

Evidence was sufficient to support conviction for second-degree murder; testimony of all eyewitnesses, including defendant, showed that defendant was agitated, angry, and not exhibiting appropriate personal self-control at time of incident, yard was dark at time defendant's car struck victim and there were several small children in yard, and defendant's car was operating properly at time of

incident and there were "acceleration marks" where defendant drove into yard. State v. Neville, 2010, 2010 WL 309960. Automobiles ⚿ 355(13)

453. —— Particular facts, identity of perpetrator, sufficiency of evidence

There was sufficient evidence that defendant intentionally killed victim with premeditation and deliberation, as required for first degree murder conviction; defendant killed victim after advancing from his hide-out in wooded area, going back into home, and shooting another individual, and forensic evidence showed that victim was shot at close range, which required multiple pulls of trigger. State v. Stitt, 2009, 2009 WL 5174377. Homicide ⚿ 1143

IX. INSTRUCTIONS

568. Manslaughter, degree of offense, instructions

Trial court was not required to instruct jury on charge of voluntary manslaughter, as lesser included offense of first degree murder; there was lapse of time between argument that took place between defendant and victim and actual shootings, defendant was shot at, re-entered home, shot another individual, and then turned to victim and shot her as well, and witness testified that defendant shot victim because she was screaming after defendant shot other individual, not because of prior altercation. State v. Stitt, 2009, 2009 WL 5174377. Homicide ⚿ 1458

585. Felony murder, instructions—In general

Since defendant was attempting to collect money due for the delivery of cocaine at the time he shot and killed the victim, the trial court did not err in submitting the murder charge to the jury on the theory of felony murder, with the underlying felony being attempted sale of cocaine; defendant admitted that he was at victim's apartment for the purpose of collecting money due for the cocaine, defendant was armed with a .25 caliber handgun which he used to shoot the victim, there was no break in the chain of events leading from the attempted sale to the killing of the victim, and defendant began shooting before he left the room in which the victim was located. State v. Freeman, 2010, 2010 WL 702461. Homicide ⚿ 588; Homicide ⚿ 600

641. Flight, instructions

There was sufficient evidence to support jury instruction regarding flight, in prosecution for murder and robbery with dangerous weapon; defendant's girlfriend testified that defendant and two victims would visit her in New York approximately every other weekend, contrary to his normal behavior, defendant went to New York alone on trip in question, telling police that one victim allowed him to borrow his car and cellular telephone, and defendant arrived in New York on a Saturday, was still within that state on Tuesday, and never mentioned date of departure. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⚿ 778(11)

XI. REVIEW

767. Scope of review

Court of Appeals, in rendering decision on issue of whether short-form first-degree murder indictment was sufficient, on appeal from conviction for first and second degree murder and robbery with dangerous weapon, was bound by decisions of the Supreme Court, as well as those already decided by other panels of Court of Appeals. State v. Stitt, 2009, 2009 WL 5174377. Courts ⚿ 90(2); Courts ⚿ 91(1)

775. —— Admission of evidence, rulings on evidence, review

Appellate court would only review de novo trial court's legal determination that cellular telephone records were admissible, in prosecution for first and second degree murder and robbery with dangerous weapon, where no findings of fact were made. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⚿ 1139

Defendant lacked standing to challenge reasonableness of search and seizure of cellular telephone records relating to telephones that he had possession of, on his appeal from his convictions for murder and robbery with dangerous weapon, absent showing that he had ownership or possessory interest in telephones. State v. Stitt, 2009, 2009 WL 5174377. Searches and Seizures ⚿ 164

Assuming that state did not fully comply with federal Stored Communications Act in obtaining records pertaining to cellular telephones possessed by defendant, in prosecution for first and second degree murder and robbery with dangerous weapon, there was no suppression remedy under federal law. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⚿ 394.1(2)

ARTICLE 7A

Rape and Other Sex Offenses

§ 14–27.4. First-degree sexual offense

Notes of Decisions

26. Sufficiency of evidence—In general

Evidence was sufficient to sustain conviction for first-degree sex offense; victim suffered laceration in her vagina, victim did not consent to vaginal sexual acts with defendant, and defendant left victim battered and bloodied after incident. State

v. Williams, 2009, 2009 WL 5174090. Rape ⇦ 51(1)

§ 14–27.7. Intercourse and sexual offenses with certain victims; consent no defense

Notes of Decisions

2.5. Nature and elements of offense

To obtain a conviction for sex offense by a custodian, the state is not required to present evidence that the defendant knew or should have known that the victim was in his custody or in the custody of his principal or employer. State v. Coleman, 2009, 684 S.E.2d 513. Rape ⇦ 5

A conviction for sexual activity by a substitute parent requires a finding that the defendant had (1) assumed the position of a parent in the home, (2) of a minor victim, and (3) engaged in a sexual act with the victim residing in the home. State v. Coleman, 2009, 684 S.E.2d 513. Infants ⇦ 13

§ 14–27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old

Notes of Decisions

6. Sentencing

Remand was required to allow the trial court to order the Department of Corrections (DOC) to perform a risk assessment of defendant, which the court must then analyze before determining whether defendant required the highest possible level of supervision and monitoring and was thus subject to enroll in lifetime satellite based monitoring (SBM). State v. Smith, 2010, 2010 WL 59268. Criminal Law ⇦ 1181.5(8)

Article 8

Assaults

§ 14–32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments

Notes of Decisions

22. —— Deadly weapon, weight and sufficiency of evidence

Evidence was sufficient to sustain conviction for assault with a deadly weapon inflicting serious bodily injury; evidence indicated that defendant used his hands as deadly weapons against smaller victim causing serious bodily injury, including substantial bleeding. State v. Williams, 2009, 2009 WL 5174090. Assault and Battery ⇦ 91.6(2)

§ 14–32.4. Assault inflicting serious bodily injury; strangulation; penalties

Notes of Decisions

Review 8

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5. Weight and sufficiency of evidence

Evidence was sufficient to sustain conviction for assault inflicting serious bodily injury; victim suffered cracked pelvic bone, broken rib, torn back ligaments, and deep cut over her left eye as result of defendant's assault. State v. Williams, 2009, 2009 WL 5174090. Assault and Battery ⇦ 60

Evidence was sufficient to sustain conviction for assault by strangulation; victim believed that defendant was trying to crush her throat when he pressed his elbow against her neck, and that he was trying to choke her when he pushed down on her back with his foot. State v. Williams, 2009, 2009 WL 5174090. Assault and Battery ⇦ 91.2

Evidence was insufficient to sustain conviction for assault inflicting serious bodily injury; although defendant beat victim after trying to perform sexual acts, victim's injuries, including her sore ribs, did not place her at substantial risk of death. State v. Williams, 2009, 2009 WL 5174090. Assault and Battery ⇦ 60

7. Double jeopardy

Defendant's convictions for first-degree kidnapping and assault with a deadly weapon inflicting serious bodily injury, arising from same conduct, did not violate Fifth Amendment's prohibition against double jeopardy, since each offense required proof of different elements. State v. Williams, 2009, 2009 WL 5174090. Double Jeopardy ⇦ 149

Defendant's separate sentences on two counts of first-degree sexual offense for inserting his fingers into victim's vagina and rectum during same sexual transaction did not violate Fifth Amendment's prohibition against double jeopardy, since defendant committed two sexual acts. State v. Williams, 2009, 2009 WL 5174090. Double Jeopardy ⇐ 148

Defendant's sentences for assault inflicting serious bodily injury and assault by strangulation, arising from same conduct, violated Fifth Amendment's prohibition against double jeopardy, even though charging statutes required proof of different elements, since statutes provided that defendants only be sentenced for higher of two offenses, namely assault inflicting serious bodily injury. State v. Williams, 2009, 2009 WL 5174090. Double Jeopardy ⇐ 141

8. Review

Even assuming variance existed between indictment alleging defendant strangled victim by placing his hands around her throat and victim's testimony that defendant used his elbow to strangle her, any variance was immaterial and thus did not warrant dismissal of indictment charging defendant with assault by strangulation; indictment was couched in statutory language of charged offense, and method of strangulation was surplusage. State v. Williams, 2009, 2009 WL 5174090. Assault and Battery ⇐ 77; Assault and Battery ⇐ 80

§ 14–33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments

Notes of Decisions

11. Officer or employee discharging official duties

The essential elements of a charge of assault on a government official are: (1) an assault (2) on a government official (3) in the actual or attempted discharge of his duties. State v. Noel, 2010, 2010 WL 702460. Assault and Battery ⇐ 48

In the offense of assaulting a government official, the assault on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. State v. Noel, 2010, 2010 WL 702460. Assault and Battery ⇐ 48

13. Lesser included offenses

A charge of malicious conduct by a prisoner need not include an assault, and thus, a charge of assault on a law enforcement officer may not necessarily be a lesser-included offense of a charge of malicious conduct by a prisoner. State v. Noel, 2010, 2010 WL 702460. Indictment and Information ⇐ 191(.5)

20. —— Officer or employee discharging official duties, indictment

Although there was variance between evidence adduced at trial and allegations in indictments, charging defendant with assault on a government official and malicious conduct by a prisoner, the variance was not material; indictments charged that defendant unlawfully and willfully assaulted detective, a government officer, by spitting on detective, and at time of offense, detective was attempting to take defendant into custody for littering, and the evidence adduced at trial tended to show that detective was interrogating defendant when defendant spit on him, and additional allegation in indictments as to exact duty being performed by detective was surplusage and would be disregarded. State v. Noel, 2010, 2010 WL 702460. Assault and Battery ⇐ 80; Obstructing Justice ⇐ 12

The specific duty the officer was performing while being assaulted is not an essential element of assault on a government official, and is not required to be set out in the indictment. State v. Noel, 2010, 2010 WL 702460. Assault and Battery ⇐ 78

27. Weight and sufficiency of evidence

Officer's testimony was sufficient to allow a reasonable inference that defendant emitted a bodily fluid onto officer and, thus, assaulted officer for purposes of offenses of malicious conduct by a prisoner and assault on a government official; officer approached defendant to ask defendant what had been thrown out of car window, defendant was sitting on the curb with his hands behind his back in handcuffs and his legs in front of him with his knees up, officer stood "directly in front of" defendant, and officer testified that defendant spit and it struck him on his pants leg. State v. Noel, 2010, 2010 WL 702460. Assault and Battery ⇐ 91.10(1); Obstructing Justice ⇐ 16

The conduct and statements of defendant prior to and during the encounter with officer supported a conclusion that defendant acted knowingly and willfully when he spit on officer, for purposes of offenses of assault on a government official and malicious conduct by a prisoner; defendant was uncooperative with officers, refusing to keep his hands up, as officers removed him from vehicle, and while defendant was sitting on the curb in handcuffs, defendant was belligerent and cussing at officers, and as officer approached defendant, and immediately before defendant spit on him, defendant said "fuck you" and "you ain't got nothing on me." State v. Noel, 2010, 2010 WL 702460. Assault and Battery ⇐ 91.10(1); Obstructing Justice ⇐ 16

ARTICLE 10

Kidnapping and Abduction

§ 14–39. Kidnapping

Notes of Decisions

6. Double jeopardy

Defendant's convictions for first-degree kidnapping and assault with a deadly weapon inflicting serious bodily injury, arising from same conduct, did not violate Fifth Amendment's prohibition against double jeopardy, since each offense required proof of different elements. State v. Williams, 2009, 2009 WL 5174090. Double Jeopardy ⇦ 149

19. —— Coercion by fraud, nature and elements of offenses

Kidnapping can be accomplished either by actual force or by fraud or trickery which induces the victim to be removed to a place other than where the victim intended to be. State v. Williams, 2009, 2009 WL 5174090. Kidnapping ⇦ 15; Kidnapping ⇦ 17

27. Weight and sufficiency of evidence—In general

Evidence was sufficient to sustain conviction for first-degree kidnapping; defendant induced victim to enter his car under pretext of paying her money for sex, he drove her to another location, and he assaulted her while performing sex acts. State v. Williams, 2009, 2009 WL 5174090. Kidnapping ⇦ 36

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS

ARTICLE 14

Burglary and Other Housebreakings

§ 14–54. Breaking or entering buildings generally

Notes of Decisions

1.5. Construction with federal law

Defendant's prior convictions under North Carolina law for felony breaking or entering were separate and distinct criminal episodes for purposes of applying the Armed Career Criminal Act (ACCA); defendant broke into 13 separate storage units, the crimes had 10 different victims, as he committed each of the 13 crimes, defendant had the opportunity to make a conscious and knowing decision to cease and desist his criminal behavior or engage in yet another crime, and defendant simply could not have broken into or entered the 13 separate storage units simultaneously. U.S. v. Carr, 2010, 2010 WL 298032. Sentencing and Punishment ⇦ 1307

Defendant's six prior convictions for breaking or entering, in violation of North Carolina law, constituted burglaries that categorically qualified as "violent felonies," within meaning of Armed Career Criminal Act (ACCA), and thus, defendant's guilty plea to possession by felon of firearm warranted career offender sentence enhancement based on predicate offenses. U.S. v. Thompson, 2009, 588 F.3d 197. Sentencing and Punishment ⇦ 1285

Defendant's Sixth Amendment right to have jury decide facts that enhanced his punishment would not be violated by enhancement of his sentence, under Armed Career Criminal Act (ACCA), since defendant's six prior convictions for breaking and entering, under North Carolina law, were predicate offenses as matter of law. U.S. v. Thompson, 2009, 588 F.3d 197. Jury ⇦ 34(7)

District court did not err, at sentencing for possession of a firearm by a convicted felon, in finding that defendant's prior North Carolina conviction for burglary qualified as a predicate "violent felony" offense for purposes of imposition of sentence under the Armed Career Criminal Act (ACCA); prior conviction qualified as generic burglary. U.S. v. Alston, 2009, 2009 WL 3157750, Unreported. Sentencing and Punishment ⇦ 1285

4. Nature and elements of offense, generally

The essential elements of felonious breaking or entering under North Carolina law are: (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. U.S. v. Carr, 2010, 2010 WL 298032. Burglary ⇦ 9(.5)

5. Breaking and entering—In general

Under North Carolina law, crime of breaking or entering does not require showing of breaking and entering, and it is therefore complete upon either a breaking or an entry. U.S. v. Carr, 2010, 2010 WL 298032. Burglary ⇦ 9(3)

SUBCHAPTER V. OFFENSES AGAINST PROPERTY

ARTICLE 16

Larceny

§ 14–71.1. Possessing stolen goods

Notes of Decisions

7. —— Value of stolen goods, elements

The fair market value of stolen property at the time of the theft must exceed the sum of $1,000 for the possession to be felonious. State v. Rahaman, 2010, 2010 WL 309461. Receiving Stolen Goods ⇦ 1

Stolen property's "fair market value," for purposes of whether possession offense is felonious, is the item's reasonable selling price at the time and place of the theft, and in the condition in which it was when stolen. State v. Rahaman, 2010, 2010 WL 309461. Receiving Stolen Goods ⇦ 1

State is not required to produce direct evidence of value to support the conclusion that the stolen property was worth over $1,000, so as to render the possession offense a felony, provided that the jury is not left to speculate as to the value of the item. State v. Rahaman, 2010, 2010 WL 309461. Receiving Stolen Goods ⇦ 8(3)

29.5. —— Value, weight and sufficiency of evidence

Evidence was sufficient to support jury finding that vehicle stolen was valued in excess of $1,000, warranting conviction for felony possession of stolen property; truck's owner, testified that he purchased the truck new in 1985 for $9,000.00; truck owner testified that had been the sole owner, that the truck was in "good shape," and that there was no damage of which he was aware, that prior to the theft, the truck was never involved in an accident and had approximately 75,000 miles on the odometer, and that after the truck was returned to him he had an accident that resulted in a "total loss" and $1,700 from insurance company, and that he would have received $2,100 had he relinquished the title. State v. Rahaman, 2010, 2010 WL 309461. Receiving Stolen Goods ⇦ 8(3)

Trial court acted within its discretion by permitting police officer to offer lay opinion as to the value of stolen truck in support of felony stolen property conviction; officer testified that he had previously worked as a car salesman in his family's business and was especially familiar with the make of vehicle stolen, that he routinely valued vehicles as a police officer, particularly in wreck investigations, that he spent approximately three hours taking inventory of the stolen truck and that it was his opinion that the truck was worth around $3,000. State v. Rahaman, 2010, 2010 WL 309461. Criminal Law ⇦ 460

Generally, a witness in a stolen property trial who has knowledge of "value" gained from experience, information, and observation may give his opinion of the value of the specific personal property; it is not necessary that the witness be an expert, and it is enough that he is familiar with the thing upon which he professes to put a value and has such knowledge and experience as to enable him intelligently to place a value on it. State v. Rahaman, 2010, 2010 WL 309461. Criminal Law ⇦ 460

§ 14–72. Larceny of property; receiving stolen goods or possessing stolen goods

Notes of Decisions

10. —— Value of property, nature and elements of larceny

The fair market value of stolen property at the time of the theft must exceed the sum of $1,000 for the possession to be felonious. State v. Rahaman, 2010, 2010 WL 309461. Receiving Stolen Goods ⇦ 1

Stolen property's "fair market value," for purposes of whether possession offense is felonious, is the item's reasonable selling price at the time and place of the theft, and in the condition in which it was when stolen. State v. Rahaman, 2010, 2010 WL 309461. Receiving Stolen Goods ⇦ 1

State is not required to produce direct evidence of value to support the conclusion that the stolen property was worth over $1,000, so as to render the possession offense a felony, provided that the jury is not left to speculate as to the value of the item. State v. Rahaman, 2010, 2010 WL 309461. Receiving Stolen Goods ⇦ 8(3)

52. —— Opinion testimony, admissibility of evidence

Generally, a witness in a stolen property trial who has knowledge of "value" gained from experience, information, and observation may give his opinion of the value of the specific personal property; it is not necessary that the witness be an expert, and it is enough that he is familiar with the thing upon which he professes to put a value and has such knowledge and experience as to enable him intelligently to place a value on it. State v. Rahaman, 2010, 2010 WL 309461. Criminal Law ⇦ 460

Trial court acted within its discretion by permitting police officer to offer lay opinion as to the value of stolen truck in support of felony stolen property conviction; officer testified that he had previously worked as a car salesman in his family's business and was especially familiar with the make of vehicle stolen, that he routinely valued vehicles as a police officer, particularly in wreck investigations, that he spent approximately three hours taking inventory of the stolen truck and that it was his opinion that the truck was worth around $3,000. State v. Rahaman, 2010, 2010 WL 309461. Criminal Law ⇦ 460

58. —— Value of property, weight and sufficiency of evidence

Evidence was sufficient to support jury finding that vehicle stolen was valued in excess of $1,000, warranting conviction for felony possession of stolen property; truck's owner, testified that he purchased the truck new in 1985 for $9,000.00; truck owner testified that had been the sole owner, that the truck was in "good shape," and that there was no damage of which he was aware, that prior to the theft, the truck was never involved in an accident and had approximately 75,000 miles on the odometer, and that after the truck was returned to him he had an accident that resulted in a "total loss" and $1,700 from insurance company, and that he would have received $2,100 had he relinquished the title. State v. Rahaman, 2010, 2010 WL 309461. Receiving Stolen Goods ⇦ 8(3)

79. Retrial

Trial court erred by stating ambiguously in juvenile delinquency adjudication order which standard of proof it utilized when making finding that juvenile committed larceny; in written adjudication order, trial court found that facts had "been proven beyond a reasonable doubt," but also noted that state had "shown by clear and convincing evidence" that juvenile committed larceny. In re D.K., 2009, 684 S.E.2d 522. Infants ⇦ 210

Article 17

Robbery

§ 14–87. Robbery with firearms or other dangerous weapons

Notes of Decisions

3.5. Lesser included offenses

Defendant was not entitled to jury instructions on common law robbery as a lesser included offense of robbery with a firearm or other dangerous weapon, even though defendant argued that there was a question of fact as to whether his gun was an operational firearm, and a witness testified that a piece of defendant's gun fell to the floor during the robbery; the witness also testified that defendant retrieved and reattached the piece of the gun, defendant used the gun to endanger or threaten the life of a person to take personal property from him or her, and defendant did not produce any evidence that the gun was rendered inoperable even if a piece did fall off. State v. Williams, 2009, 685 S.E.2d 534. Robbery ⇦ 27(5)

Where there is positive and unequivocal evidence as to each and every element of armed robbery, and there is no evidence supporting the defendant's guilt of a lesser included offense, the trial court may properly decline to instruct the jury on the lesser included offense of common law robbery. State v. Williams, 2009, 685 S.E.2d 534. Robbery ⇦ 27(5)

Primary distinction between armed robbery and common law robbery is that armed robbery is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened; this defining factor is not an essential element of common law robbery. State v. Williams, 2009, 685 S.E.2d 534. Robbery ⇦ 11

13. Nature and elements—In general

"Armed robbery" is defined as taking of personal property of another in his presence or from his person without his consent by endangering or threatening his life with firearm or other deadly weapon with taker knowing that he is not entitled to property and taker intending to permanently deprive owner of property. State v. Stitt, 2009, 2009 WL 5174377. Robbery ⇦ 11

21. —— Time of use or threatened use of weapon, nature and elements

To be found guilty of robbery with dangerous weapon, the defendant's threatened use or use of dangerous weapon must precede or be concomitant with taking, or be so joined by time and circumstances with taking as to be part of one continuous transaction; where continuous transaction occurs, temporal order of threat or use of dangerous weapon and taking is immaterial. State v. Stitt, 2009, 2009 WL 5174377. Robbery ⇦ 11

45.5. Defenses

Defendant lacked standing to challenge reasonableness of search and seizure of cellular telephone records relating to telephones that he had possession of, on his appeal from his convictions for murder and robbery with dangerous weapon, absent showing that he had ownership or possessory interest in telephones. State v. Stitt, 2009, 2009 WL 5174377. Searches and Seizures ⇦ 164

46. Admissibility of evidence—In general

Defendant lacked standing to challenge reasonableness of search and seizure of cellular telephone records relating to telephones that he had posses-

sion of, on his appeal from his convictions for murder and robbery with dangerous weapon, absent showing that he had ownership or possessory interest in telephones. State v. Stitt, 2009, 2009 WL 5174377. Searches and Seizures ⇦ 164

Appellate court would only review de novo trial court's legal determination that cellular telephone records were admissible, in prosecution for first and second degree murder and robbery with dangerous weapon, where no findings of fact were made. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⇦ 1139

Appellate court would not consider defendant's argument that state's failure to obtain subpoena to secure records for cellular telephones in his possession warranted suppression of those records, in prosecution for first and second degree murder and robbery with dangerous weapon, where defendant did not raise that argument before trial court. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⇦ 1036.1(4)

57. Weight and sufficiency of evidence—In general

Conviction for robbery with dangerous weapon was supported by sufficient evidence; defendant used deadly weapon to kill victims and then took their property, not as mere afterthought, but with intent of utilizing victims' vehicle and cellular telephones, and selling other personal property, killings and robbery occurred during one continuous transaction, and defendant took property out of state with no intent of returning it. State v. Stitt, 2009, 2009 WL 5174377. Robbery ⇦ 24.15(2)

Fact that victims were deceased at time defendant took their property was irrelevant for purposes of analyzing sufficiency of evidence to support conviction for robbery with dangerous weapon; all that was required was that elements of armed robbery occurred under circumstances and in timeframe that could be perceived as single transaction. State v. Stitt, 2009, 2009 WL 5174377. Robbery ⇦ 11

63. —— Intent, weight and sufficiency of evidence

Where evidence does not permit inference that a defendant ever intended to return property forcibly taken but requires conclusion that defendant was totally indifferent as to whether owner ever recovered property, there is no justification for indulging fiction that taking was for temporary purpose, without any animus furandi or lucri causa, as would preclude conviction for robbery with dangerous weapon. State v. Stitt, 2009, 2009 WL 5174377. Robbery ⇦ 11

70. Instructions—In general

There was sufficient evidence to support jury instruction regarding flight, in prosecution for murder and robbery with dangerous weapon; defendant's girlfriend testified that defendant and two victims would visit her in New York approximately every other weekend, contrary to his normal behavior, defendant went to New York alone on trip in question, telling police that one victim allowed him to borrow his car and cellular telephone, and defendant arrived in New York on a Saturday, was still within that state on Tuesday, and never mentioned date of departure. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⇦ 778(11)

98. Review—In general

Court of Appeals, in rendering decision on issue of whether short-form first-degree murder indictment was sufficient, on appeal from conviction for first and second degree murder and robbery with dangerous weapon, was bound by decisions of the Supreme Court, as well as those already decided by other panels of Court of Appeals. State v. Stitt, 2009, 2009 WL 5174377. Courts ⇦ 90(2); Courts ⇦ 91(1)

Article 19C

Identity Theft

§ 14–113.20. Identity theft

Notes of Decisions

Use of identifying information 4

4. Use of identifying information

Defendant's agreeing with police officer's recitation of the last four digits of another person's social security number was a use of identifying information of another person within the meaning of identity theft statute. State v. Barron, 2010, 2010 WL 702573. False Pretenses ⇦ 19

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY

ARTICLE 26

Offenses against Public Morality and Decency

§ 14–202.1. Taking indecent liberties with children

Notes of Decisions

2. In general

Multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties with a minor. State v. Coleman, 2009, 684 S.E.2d 513. Criminal Law ⇐ 29(12)

2.5. Construction with other laws

Evidence was insufficient to establish that defendant had been convicted of an "aggravated offense," and thus the court could not order defendant to enroll in satellite-based monitoring (SBM) for the rest of his natural life; defendant was convicted of indecent liberties with a child, the SBM statute provided that a person was eligible for SBM is he or she was convicted of an aggravated offense, a convictions for indecent liberties did not meet the statutory definition of an aggravated offense, and the court could not look at the factual basis for defendant's crime when determining whether or not the offense was an aggravated offense, rather, the court had to look at the statutory definition of crime for which defendant had been convicted. State v. Singleton, 2010, 2010 WL 59255. Mental Health ⇐ 469(4)

3.5. Nature and elements of offense

Elements of indecent liberties with a minor are (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire. State v. Coleman, 2009, 684 S.E.2d 513. Infants ⇐ 13

When an adult who has a custodial relationship with a child watches that child engage in sexual activity with another person or facilitates such activity, the adult's actions constitute indecent liberties with a minor. State v. Coleman, 2009, 684 S.E.2d 513. Infants ⇐ 13

10. —— Gratification of sexual desire, intent of accused

Sexual gratification, for purposes of indecent liberties with a minor, may be inferred from the evidence relating to the defendant's actions. State v. Coleman, 2009, 684 S.E.2d 513. Infants ⇐ 20

20. Instructions

Defendant was not entitled to a jury instruction on mistake of age, in prosecution for taking indecent liberties with a child; mistake of age was not a valid defense to the charge as there was no explicit mens rea requirement as to the victim's age. State v. Breathette, 2010, 2010 WL 702446. Criminal Law ⇐ 772(6); Infants ⇐ 13

The trial court's jury instruction defining the term "willfully" was a correct statement of law, and thus the trial court did not err when it failed to give defendant's proffered jury instruction defining willfully, in prosecution for taking indecent liberties with a child. State v. Breathette, 2010, 2010 WL 702446. Criminal Law ⇐ 829(3)

26. Review

Defendant committed two separate acts that supported two separate convictions for indecent liberties with a minor, even though defendant argued that his conduct was a single transaction; defendant removed one minor victim's bra and touched victim's breasts, and defendant watched and facilitated victim's sexual encounter with another minor. State v. Coleman, 2009, 684 S.E.2d 513. Criminal Law ⇐ 29(12)

§ 14–202.3. Solicitation of child by computer or certain other electronic devices to commit an unlawful sex act

Notes of Decisions

2. Weight and sufficiency of evidence

Evidence was sufficient to establish that defendant enticed or advised police detective, who was posing as a 14-year-old girl, to meet with him for the purpose of committing an unlawful sex act, in support of conviction for solicitation of a child by computer to commit an unlawful sex act; defendant met detective on the internet, where detective was posing as a 14-year-old girl, detective told defendant that she was 14 years old, defendant stated that he liked younger girls, that he wanted to "do whatever you are curious about or want to try," told detective that he was turned on while chatting with her, and stated "I want you on top of me," and defendant arranged to meet detective at the mall and appeared for their meeting. State v. Fraley, 2010, 2010 WL 537499. Infants ⇐ 13; Telecommunications ⇐ 1350

ARTICLE 27A

Sex Offender and Public Protection Registration Programs

Part 1. Registration Programs, Purpose and Definitions Generally

§ 14–208.6. Definitions

Notes of Decisions

Aggravated offenses 5
Remand 6

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5. Aggravated offenses

Evidence was insufficient to establish that defendant had been convicted of an "aggravated offense," and thus the court could not order defendant to enroll in satellite-based monitoring (SBM) for the rest of his natural life; defendant was convicted of indecent liberties with a child, the SBM statute provided that a person was eligible for SBM is he or she was convicted of an aggravated offense, a convictions for indecent liberties did not meet the statutory definition of an aggravated offense, and the court could not look at the factual basis for defendant's crime when determining whether or not the offense was an aggravated offense, rather, the court had to look at the statutory definition of crime for which defendant had been convicted. State v. Singleton, 2010, 2010 WL 59255. Mental Health ⇦ 469(4)

Neither attempted first-degree sex offense nor offense of taking indecent liberties with a child is an "aggravated offense," for purposes of determining whether a defendant convicted of the offenses may be required to submit to registration or monitoring as a sex offender. State v. Davison, 2009, 2009 WL 5174291. Mental Health ⇦ 469(2)

Defendant's conviction of attempted first-degree sexual offense was not a conviction for an "aggravated offense," as required to support sentencing defendant to satellite-based monitoring (SBM) after his release from prison, since defendant was convicted of a crime that fell short of a completed sexual act with victim. State v. Davison, 2009, 2009 WL 5174291. Mental Health ⇦ 469(2)

Defendant's conviction for taking indecent liberties with a child was not a conviction for an "aggravated offense," as required to support sentencing defendant to satellite-based monitoring (SBM) after his release from prison, since conviction did not require that defendant commit a sexual act involving vaginal, anal or oral penetration, did not require that victim be less than 12 years of age, and did not require that offense be committed through the use of force or the threat of serious violence. State v. Davison, 2009, 2009 WL 5174291. Mental Health ⇦ 469(2)

Trial court could not rely on defendant's statement made during guilty-plea colloquy to find that defendant, convicted of attempted first-degree sexual offense and taking indecent liberties with a child, had been convicted of an aggravated offense, as required to support sentencing defendant to submit to satellite-based monitoring (SBM) after his release form prison; trial court could only consider elements of offenses in determining whether offenses were aggravated, not underlying factual scenario. State v. Davison, 2009, 2009 WL 5174291. Mental Health ⇦ 469(2)

6. Remand

Remand was required to allow the trial court to order the Department of Corrections (DOC) to perform a risk assessment of defendant, which the court must then analyze before determining whether defendant required the highest possible level of supervision and monitoring and was thus subject to enroll in lifetime satellite based monitoring (SBM). State v. Smith, 2010, 2010 WL 59268. Criminal Law ⇦ 1181.5(8)

Part 5. Sex Offender Monitoring

§ 14–208.40. Establishment of program; creation of guidelines; duties

Notes of Decisions

2. Application to prior convictions

Post-sentencing order requiring defendant to enroll in lifetime satellite-based monitoring (SBM) was pursuant to a civil, regulatory scheme and not a criminal punishment, and therefore, the requirement could not increase the maximum penalty for defendant's crime, and the state did not need to present any facts in an indictment or prove any facts beyond a reasonable doubt to a jury in order to subject defendant to SBM. State v. Hagerman, 2009, 685 S.E.2d 153. Jury ⇦ 34(7); Mental Health ⇦ 469(4); Mental Health ⇦ 469(5)

§ 14–208.40A. Determination of satellite-based monitoring requirement by court

Notes of Decisions

2. Review

Remand was required to allow the trial court to order the Department of Corrections (DOC) to perform a risk assessment of defendant, which the court must then analyze before determining whether defendant required the highest possible level of supervision and monitoring and was thus subject to enroll in lifetime satellite based monitoring (SBM). State v. Smith, 2010, 2010 WL 59268. Criminal Law ⇐ 1181.5(8)

Trial court could not rely on defendant's statement made during guilty-plea colloquy to find that defendant, convicted of attempted first-degree sexual offense and taking indecent liberties with a child, had been convicted of an aggravated offense, as required to support sentencing defendant to submit to satellite-based monitoring (SBM) after his release form prison; trial court could only consider elements of offenses in determining whether offenses were aggravated, not underlying factual scenario. State v. Davison, 2009, 2009 WL 5174291. Mental Health ⇐ 469(2)

When making a determination of whether a defendant had committed an aggravated offense, so as to support sentencing defendant to submission to satellite-based monitoring (SBM), the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction. State v. Davison, 2009, 2009 WL 5174291. Mental Health ⇐ 469(2)

§ 14–208.40B. Determination of satellite-based monitoring requirement in certain circumstances

Notes of Decisions

½. Validity

Retroactive application to defendant, who pleaded guilty to taking indecent liberties with a minor, of statutory provisions requiring certain offenders, including those with a conviction for an offense against minors, to submit to lifetime satellite-based monitoring did not violate the constitutional ex post facto clauses. State v. Vogt, 2009, 685 S.E.2d 23. Constitutional Law ⇐ 2820; Mental Health ⇐ 433(2)

1.5. Construction with other laws

The Court of Appeals had jurisdiction to hear defendant's appeal of order granting the State's petition for satellite-based monitoring (SBM) of defendant; the order requiring defendant to submit to SBM for the rest of his natural life was a final judgment, and statute granted appellate jurisdiction over appeals from final judgments of the superior court. State v. Singleton, 2010, 2010 WL 59255. Mental Health ⇐ 469(6)

2.5. Guilty pleas

Failure of trial court to advise defendant, before accepting his guilty plea to taking indecent liberties with a minor, that he might be subjected to lifetime satellite-based monitoring did not serve to invalidate the resulting conviction; the monitoring was not an automatic result of defendant's plea. State v. Vogt, 2009, 685 S.E.2d 23. Criminal Law ⇐ 273.1(4)

3. Sufficiency of evidence

Evidence was insufficient to establish that defendant had been convicted of an "aggravated offense," and thus the court could not order defendant to enroll in satellite-based monitoring (SBM) for the rest of his natural life; defendant was convicted of indecent liberties with a child, the SBM statute provided that a person was eligible for SBM is he or she was convicted of an aggravated offense, a convictions for indecent liberties did not meet the statutory definition of an aggravated offense, and the court could not look at the factual basis for defendant's crime when determining whether or not the offense was an aggravated offense, rather, the court had to look at the statutory definition of crime for which defendant had been convicted. State v. Singleton, 2010, 2010 WL 59255. Mental Health ⇐ 469(4)

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE

ARTICLE 30

Obstructing Justice

§ 14–223. Resisting officers

Notes of Decisions

Construction with federal law 1.5

1.5. Construction with federal law

Arrestee's recollection of what magistrate said at probable cause hearing following his arrest for obstructing justice, under North Carolina law, was not memorandum, report, record, or data compilation kept in course of regularly conducted business activity or by public officer or agency, and thus was not admissible on summary judgment under records exceptions to hearsay rule, in arrestee's civil rights action against police officers. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Evidence ⇦ 333(1); Federal Civil Procedure ⇦ 2537

University police officer was entitled to qualified immunity from § 1983 unlawful arrest claim brought by motorist who was arrested for obstructing officer in discharging or attempting to discharge duty of his office, in violation of North Carolina law; at time of motorist's actions, it was not clearly established that he had right not to be arrested for obstructing officer, and no reasonable officer would have understood that officer's conduct violated Fourth Amendment. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Civil Rights ⇦ 1376(6)

University police officer who was attempting to explain traffic citation to motorist when another officer arrested him for obstructing justice, in violation of North Carolina law, did not act personally to deprive motorist of his rights, and thus could not be liable for unlawful arrest under § 1983; officer attempting to explain citation did not make arrest, nor was she part of decision to arrest motorist. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Civil Rights ⇦ 1358

2.5. Nature and elements of the offense

Purpose of North Carolina statute rendering it misdemeanor to willfully and unlawfully resist, delay, or obstruct public officer in discharging or attempting to discharge duty of his office is to enforce orderly conduct in important mission of preserving peace, carrying out judgments and orders of court, and upholding dignity of law; statute is concerned with acts threatening public officer with injury only insofar as they interfere with performance of his official duties. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Obstructing Justice ⇦ 2

Merely remonstrating with an officer or criticizing or questioning officer while he is performing his duty, when done in orderly manner, does not generally amount to obstructing or delaying an officer in performance of his duties, in violation of North Carolina law. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Obstructing Justice ⇦ 7

North Carolina statute rendering it misdemeanor to willfully and unlawfully resist, delay, or obstruct public officer in discharging or attempting to discharge duty of his office does not apply to communications simply intended to assert rights, seek clarification, or obtain information in peaceful way; only communications intended to hinder or prevent officer from carrying out his duty are discouraged by statute. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Obstructing Justice ⇦ 7

In the offense of resisting an officer, the resisting of the public officer in the performance of some duty is the primary conduct proscribed by that statute, and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense. State v. Noel, 2010, 2010 WL 702460. Obstructing Justice ⇦ 7

5. Acts constituting resistance, obstruction or delay

Defendant's flight from residence after officer announced "police, search warrant" at front door did not constitute resisting an officer; officers were at the house to execute a search warrant, not an arrest warrant, and officer was not making an investigatory stop when he announced "police, search warrant" at the front door. State v. Richardson, 2010, 2010 WL 537459.

20. Admissibility of evidence

Portions of arrestee's summary judgment affidavit setting forth his recollection of what magistrate said at probable cause hearing following his arrest for obstructing justice, under North Carolina law, were not admissible on summary judgment under "present sense impression" and/or "excited utterance" exceptions to hearsay rule, in arrestee's civil rights action against police officers; magistrate was not perceiving event or condition while making statement, nor did magistrate make statement immediately thereafter, and magistrate's alleged findings and conclusions were based on testimony of those people present at scene of arrest. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Evidence ⇦ 123(1); Federal Civil Procedure ⇦ 2537

21. Weight and sufficiency of evidence

There was no evidence that conduct of university police officer who arrested motorist for obstructing justice was corrupt of malicious, or that he acted outside of and beyond scope of his duties, and thus officer was entitled to qualified immunity, under

North Carolina law, from motorist's false imprisonment claim. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Municipal Corporations ⇐ 747(3)

26. Review

University police officer lacked probable cause to arrest motorist for violating North Carolina law rendering it illegal to willfully and unlawfully resist, delay, or obstruct public officer in discharging or attempting to discharge duty of his office; officer arrived on scene of traffic stop and learned that another officer planned to issue motorist citation for seat belt violation, during exchange with officers, motorist repeatedly asked for officers' names and badge numbers and raised his voice, as did officers, throughout escalating verbal confrontation, motorist remained in car seat, and time between when officers approached car and when officer arrested motorist was slightly less than two minutes. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Automobiles ⇐ 349(8)

University police officer's use of force in arresting motorist for obstructing justice, in violation of North Carolina law, after he engaged in escalating, verbal confrontation with officers during traffic stop for seat belt violation was excessive; motorist did not obstruct justice, motorist remained seated in his car and made no threats, motorist did not actively resist arrest or attempt to evade arrest after officer told him to get out of car, once outside car, motorist was handcuffed with his hands behind his back, once he was placed in handcuffs, motorist did not engage in any threatening behavior, and when police sergeant arrived at scene, he switched handcuffs to front and transported motorist to detention center in front seat. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Arrest ⇐ 68(2)

Article 33

Prison Breach and Prisoners

§ 14–258.4. Malicious conduct by prisoner

Notes of Decisions

2. Lesser included offenses

A charge of malicious conduct by a prisoner need not include an assault, and thus, a charge of assault on a law enforcement officer may not necessarily be a lesser-included offense of a charge of malicious conduct by a prisoner. State v. Noel, 2010, 2010 WL 702460. Indictment and Information ⇐ 191(.5)

5. Elements

In the offense of malicious conduct by a prisoner, the malicious conduct toward the officer is the primary conduct proscribed by the statute, and the particular duty that the officer is performing at the time of the offense is of secondary importance. State v. Noel, 2010, 2010 WL 702460. Obstructing Justice ⇐ 7

The specific duty the officer was performing at the time of the offense is not an essential element of malicious conduct by a prisoner, and is not required to be set out in the indictment, and in this respect, the offense of malicious conduct by a prisoner is comparable to the offense of fleeing to elude arrest. State v. Noel, 2010, 2010 WL 702460. Obstructing Justice ⇐ 11

The standard for determining whether a defendant is in custody, for purposes of offense of malicious conduct by prisoner, is whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. State v. Noel, 2010, 2010 WL 702460. Obstructing Justice ⇐ 7

6. Sufficiency of evidence

Officer's testimony was sufficient to allow a reasonable inference that defendant emitted a bodily fluid onto officer and, thus, assaulted officer for purposes of offenses of malicious conduct by a prisoner and assault on a government official; officer approached defendant to ask defendant what had been thrown out of car window, defendant was sitting on the curb with his hands behind his back in handcuffs and his legs in front of him with his knees up, officer stood "directly in front of" defendant, and officer testified that defendant spit and it struck him on his pants leg. State v. Noel, 2010, 2010 WL 702460. Assault and Battery ⇐ 91.10(1); Obstructing Justice ⇐ 16

The conduct and statements of defendant prior to and during the encounter with officer supported a conclusion that defendant acted knowingly and willfully when he spit on officer, for purposes of offenses of assault on a government official and malicious conduct by a prisoner; defendant was uncooperative with officers, refusing to keep his hands up, as officers removed him from vehicle, and while defendant was sitting on the curb in handcuffs, defendant was belligerent and cussing at officers, and as officer approached defendant, and immediately before defendant spit on him, defendant said "fuck you" and "you ain't got nothing on me." State v. Noel, 2010, 2010 WL 702460. Assault and Battery ⇐ 91.10(1); Obstructing Justice ⇐ 16

Evidence in prosecution of defendant for malicious conduct by prisoner was sufficient to allow a jury to conclude that defendant would have believed he was not free to leave the scene and, thus, to conclude that defendant was in custody at the time of the encounter; defendant was uncooperative with officers, refusing to keep his hands up, as officers removed him from vehicle, and while defendant was sitting on the curb in handcuffs, defendant was belligerent and cussing at officers, and officer stated that defendant was not free to leave

due to extent of the investigation for vehicle chase and checking vehicle for other contraband or weapons. State v. Noel, 2010, 2010 WL 702460. Obstructing Justice ⚿ 16

8. Sufficiency of indictment

Although there was variance between evidence adduced at trial and allegations in indictments, charging defendant with assault on a government official and malicious conduct by a prisoner, the variance was not material; indictments charged that defendant unlawfully and willfully assaulted detective, a government officer, by spitting on detective, and at time of offense, detective was attempting to take defendant into custody for littering, and the evidence adduced at trial tended to show that detective was interrogating defendant when defendant spit on him, and additional allegation in indictments as to exact duty being performed by detective was surplusage and would be disregarded. State v. Noel, 2010, 2010 WL 702460. Assault and Battery ⚿ 80; Obstructing Justice ⚿ 12

Indictment, which was properly couched in the language of malicious conduct by prisoner statute, was sufficient to identify the offense of malicious conduct by a prisoner, to protect defendant from double jeopardy, and to enable defendant to prepare for trial and present a defense, and thus, the indictment was proper. State v. Noel, 2010, 2010 WL 702460. Indictment and Information ⚿ 110(21)

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE

ARTICLE 35

Offenses Against the Public Peace

§ 14–269. Carrying concealed weapons

Notes of Decisions

4. Nature and elements of offenses, generally

Where police officers do not find the defendant in actual possession of a weapon, the State may nonetheless sustain a conviction for possession of a firearm by a felon or carrying a concealed weapon based upon a theory of constructive possession, which arises where a defendant is not in actual possession of an object, but has both the power and intent to control the object. State v. Mewborn, 2009, 684 S.E.2d 535. Weapons ⚿ 4

To withstand a motion to dismiss charges of possession of a firearm by a felon or carrying a concealed weapon, the State must show that a defendant possessed or carried the weapon in question. State v. Mewborn, 2009, 684 S.E.2d 535. Weapons ⚿ 17(5)

17. —— Weight and sufficiency, evidence

Evidence was sufficient to support finding that defendant had constructive possession of handgun found by officers; defendant ran through an open field in a high traffic area while fleeing officers, he appeared to have something heavy in his back pocket and appeared to make throwing motions from that pocket, and weapon was dry and clean even though grass in the field where weapon was found was wet. State v. Mewborn, 2009, 684 S.E.2d 535. Weapons ⚿ 17(4)

SUBCHAPTER XI. GENERAL POLICE REGULATIONS

ARTICLE 37

Lotteries, Gaming, Bingo and Raffles

Part 1. Lotteries and Gaming

§ 14–306.1A. Types of machines and devices prohibited by law; penalties

Notes of Decisions

Construction with federal law 2
Validity 1

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1. Validity

State statute authorizing Class III gaming, including video poker, only by Indian tribes and only on tribal land satisfied Indian Gaming Regulatory Act (IGRA) prerequisite that North Carolina be a state that permits such gaming; IRGA permitted states to grant tribes preferential gaming rights, state had explicitly authorized Indian gaming in accordance with IGRA, and statute's voiding clause manifested Legislature's intent that Indian tribe retain its Class III gaming rights under tribal-state compact no matter what the outcome was of a challenge to the statute. McCracken and Amick,

Inc. v. Perdue, 2009, 2009 WL 5067298. Indians ⇐ 337(2)

2. Construction with federal law

Phrase "any person, organization, or entity" in Indian Gaming Regulatory Act (IGRA) provision permitting Class III gaming on Indian lands in part if such activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity" did not require state to permit Class III gaming for any purpose by any non-Indian person, organization, or entity, if it permitted gaming for an Indian tribe, but rather allowed state to grant Indian tribe exclusive Class III gaming rights if state law permitted Class III gaming for at least one purpose for at least one person, organization, or entity, including the Indian tribe itself. McCracken and Amick, Inc. v. Perdue, 2009, 2009 WL 5067298. Indians ⇐ 337(2)

Article 47

Cruelty to Animals

§ 14–360. Cruelty to animals; construction of section

Notes of Decisions

9. Weight and sufficiency of evidence

Evidence was sufficient to support submission of cruelty to animals charge to jury on basis of theory that defendant "tormented" cat by confining and exposing the cat to unsanitary conditions inside defendant's house for a prolonged period; animal control officers entered defendant's house to a severely strong odor of cat feces and ammonia, which could be smelled outside of the property, and inside the house accumulated feces and urine covered every surface, and officers observed that cats, covered in their own feces and urine, had left streak marks from jumping on the walls, windows, and doors trying to get out of the house. State v. Mauer, 2010, 2010 WL 537493. Animals ⇐ 3.5(9)

Article 54A

The Felony Firearms Act

§ 14–415.1. Possession of firearms, etc., by felon prohibited

Notes of Decisions

1. Validity

Statute prohibiting convicted felons from possessing firearms was not facially invalid as violating right to bear arms under North Carolina constitution, but rather was reasonable regulation fairly related to preservation of public peace and safety. State v. Whitaker, 2009, 2009 WL 5174085. Weapons ⇐ 3

Statute prohibiting convicted felons from possessing firearms was not invalid as violating right to bear arms under North Carolina constitution as applied to defendant previously convicted for possessing and distributing cocaine and for indecent liberties with a minor; rather, statute was reasonable regulation fairly related to preservation of public peace and safety in light of defendant's past felonies. State v. Whitaker, 2009, 2009 WL 5174085. Weapons ⇐ 3

3.6. Construction with other laws

Defendant's conviction in Virginia for possession of a firearm by a convicted felon was substantially similar to the North Carolina offense of possession of a firearm by a felon, and thus the court could use defendant's Virginia conviction when assigning prior record level points during sentencing; the Virginia possession of firearms by convicted felons prohibited a person convicted of a felony of knowingly and intentionally possession or transporting any firearm, and the North Carolina possession of a firearm by a felon statute prohibited a convicted felon from purchasing, owning, possessing, or having in his custody, care, or control any firearm. State v. Fortney, 2010, 2010 WL 59252. Sentencing and Punishment ⇐ 95

9. Admissibility of evidence

Defendant's prior felony rape conviction was admissible during prosecution for possession of a firearm by a felon; the possession of a firearm by a felon statute specifically allowed admission of a prior conviction for the purpose of proving a violation of the statute. State v. Fortney, 2010, 2010 WL 59252. Criminal Law ⇐ 369.2(3.1)

10. Weight and sufficiency of evidence

Evidence was sufficient to support finding that defendant had constructive possession of handgun found by officers; defendant ran through an open field in a high traffic area while fleeing officers, he appeared to have something heavy in his back pocket and appeared to make throwing motions from that pocket, and weapon was dry and clean even though grass in the field where weapon was found was wet. State v. Mewborn, 2009, 684 S.E.2d 535. Weapons ⇐ 17(4)

11. Presumptions and burden of proof

To withstand a motion to dismiss charges of possession of a firearm by a felon or carrying a concealed weapon, the State must show that a defendant possessed or carried the weapon in question. State v. Mewborn, 2009, 684 S.E.2d 535. Weapons ⇐ 17(5)

Where police officers do not find the defendant in actual possession of a weapon, the State may nonetheless sustain a conviction for possession of a firearm by a felon or carrying a concealed weapon based upon a theory of constructive possession, which arises where a defendant is not in actual possession of an object, but has both the power and intent to control the object. State v. Mewborn, 2009, 684 S.E.2d 535. Weapons ⇐ 4

13. Review, harmless or reversible error

Trial court committed reversible error in entering multiple convictions for simultaneous possession of firearms by convicted felon; defendant should have been convicted and sentenced only once for simultaneously possessing 11 firearms. State v. Whitaker, 2009, 2009 WL 5174085. Criminal Law ⇐ 29(15)

Chapter 15

Criminal Procedure

Article 15

Indictment

§ 15–144. Essentials of bill for homicide

Notes of Decisions

Review 28

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5. Sufficiency of indictment, generally

Short-form first-degree murder indictment stating that defendant unlawfully, willfully, and feloniously "did of malice aforethought" kill victim, and that act was in violation of state law, notified defendant that he was being charged with first degree murder, and set forth requisite elements of that offense, and thus indictment was sufficient. State v. Stitt, 2009, 2009 WL 5174377. Indictment and Information ⇐ 19

6. Certainty and particularity of allegations

Specifically alleging premeditation and deliberation is not required by statute governing essentials of bill for homicide. State v. Stitt, 2009, 2009 WL 5174377. Homicide ⇐ 837

28. Review

Court of Appeals, in rendering decision on issue of whether short-form first-degree murder indictment was sufficient, on appeal from conviction for first and second degree murder and robbery with dangerous weapon, was bound by decisions of the Supreme Court, as well as those already decided by other panels of Court of Appeals. State v. Stitt, 2009, 2009 WL 5174377. Courts ⇐ 90(2); Courts ⇐ 91(1)

Article 17

Trial in Superior Court

§ 15–173. Demurrer to the evidence

Notes of Decisions

3. Double jeopardy

Statute stating that when a trial court grants a defendant's motion to dismiss at the close of evidence, that ruling has the same effect as a verdict of not guilty, did not apply to an effective dismissal that was not based on motion made before jury was instructed, and therefore, the statute did not have the effect of barring retrial on double jeopardy grounds, where conviction was vacated on appeal because jury was instructed on charge not included in the indictment. State v. Rahaman, 2010, 2010 WL 309461. Double Jeopardy ⇐ 108

The Fifth Amendment right to be free from double jeopardy only attaches in a situation where the motion to dismiss is granted due to insufficiency of the evidence to support each element of the crime charged, not where dismissal is based on motion to dismiss filed before jury is instructed. State v. Rahaman, 2010, 2010 WL 309461. Double Jeopardy ⇐ 93

Chapter 15A

Criminal Procedure Act

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES

ARTICLE 9

Search and Seizure by Consent

§ 15A–221. General authorization; definition of "consent"

Notes of Decisions

3. Consent to search and seizure—In general

Neither state law nor federal law requires that any specific warning be provided to the party whose property is to be searched prior to obtaining consent for the consent to be valid. State v. Stover, 2009, 685 S.E.2d 127. Searches and Seizures ⇐ 183

4. —— Validity of consent, consent to search and seizure

Record supported a finding that defendant's consent to a search of his residence for drug evidence was voluntary, even though a police officer, after a warrantless entry by means of kicking down the door, initially aimed his gun at defendant when the officer perceived that defendant was attempting to flee; the officer promptly lowered the gun, defendant was not handcuffed immediately and was even escorted to a neighbor's house to find someone to care for his child, and defendant consented after two police officers asked for his permission to search the residence after they conducted an initial protective sweep. State v. Stover, 2009, 685 S.E.2d 127. Searches and Seizures ⇐ 182

Only requirement for a valid consent search is the voluntary consent given by a party who had reasonably apparent authority to grant or withhold such consent. State v. Stover, 2009, 685 S.E.2d 127. Searches and Seizures ⇐ 173.1; Searches and Seizures ⇐ 180

In determining whether a consent to a search was given voluntarily, a court must look at the totality of the circumstances. State v. Stover, 2009, 685 S.E.2d 127. Searches and Seizures ⇐ 180

6. —— Persons giving consent, consent to search and seizure

Mere fact that a person is in custody does not mean that he cannot voluntarily consent to a search. State v. Stover, 2009, 685 S.E.2d 127. Searches and Seizures ⇐ 184

§ 15A–222. Person from whom effective consent may be obtained

Notes of Decisions

1. Construction with other law

Neither state law nor federal law requires that any specific warning be provided to the party whose property is to be searched prior to obtaining consent for the consent to be valid. State v. Stover, 2009, 685 S.E.2d 127. Searches and Seizures ⇐ 183

5. Consent to search, generally

Only requirement for a valid consent search is the voluntary consent given by a party who had reasonably apparent authority to grant or withhold such consent. State v. Stover, 2009, 685 S.E.2d 127. Searches and Seizures ⇐ 173.1; Searches and Seizures ⇐ 180

Mere fact that a person is in custody does not mean that he cannot voluntarily consent to a search. State v. Stover, 2009, 685 S.E.2d 127. Searches and Seizures ⇐ 184

15. Evidence supporting finding of consent

Record supported a finding that defendant's consent to a search of his residence for drug evidence was voluntary, even though a police officer, after a warrantless entry by means of kicking down the door, initially aimed his gun at defendant when the officer perceived that defendant was attempting to flee; the officer promptly lowered the gun, defendant was not handcuffed immediately and was even escorted to a neighbor's house to find someone to care for his child, and defendant consented after two police officers asked for his permission to search the residence after they conducted an initial protective sweep. State v. Stover, 2009, 685 S.E.2d 127. Searches and Seizures ⇐ 182

16. Review

In determining whether a consent to a search was given voluntarily, a court must look at the totality of the circumstances. State v. Stover, 2009, 685 S.E.2d 127. Searches and Seizures ⇐ 180

Article 11

Search Warrants

§ 15A–244. Contents of the application for a search warrant

Notes of Decisions

5. Probable cause, generally

Evidence obtained in one location cannot provide probable cause for the search of another location when the evidence offered does not implicate the premises to be searched. State v. Washburn, 2009, 685 S.E.2d 555. Searches and Seizures ⇐ 40.1

7. —— Particular applications, probable cause as shown in affidavits or other supporting materials

Substantial basis existed for a magistrate to conclude that there was probable cause to issue a warrant to search defendant's residence for drug evidence; affiant officer offered proof of illegal drugs found in defendant's unit in a storage facility and provided statements by an informant that defendant stored additional drugs in a tool box at his residence, and the affidavit indicated the informant's reliability and basis of knowledge. State v. Washburn, 2009, 685 S.E.2d 555. Controlled Substances ⇐ 148(3)

Article 13

DNA Database and Databank

§ 15A–270. Post–test procedures

Notes of Decisions

Construction and application 1

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1. Construction and application

Dismissal of defendant's appeal, which sought review of the trial court's determination that post-conviction DNA test results were unfavorable to defendant, and thus defendant was not entitled to relief, was warranted; statute governing post-DNA test procedures did not grant a defendant the right to appeal from the trial court's ruling as to the results of the DNA testing. State v. Norman, 2010, 2010 WL 348349. Criminal Law ⇐ 1023(15)

Article 16

Electronic Surveillance

§ 15A–287. Interception and disclosure of wire, oral, or electronic communications prohibited

Notes of Decisions

2. Willful or intentional act

Public safety was the impetus for town police chief's acts in intercepting, via a pager device, communications that a police officer had made while inside his patrol car, and therefore, the interception was not "willful," as proscribed by the North Carolina Electronic Surveillance Act; the police chief and others staged the execution of a fake search warrant and monitored the officer's patrol car with a pager device in order to ascertain whether there was veracity to complaints that the officer had been tipping-off drug dealers as to police searches, which, if such was the case, could put other officers, informants, and public in danger. Wright v. Town of Zebulon, 2010, 2010 WL 537539. Telecommunications ⇐ 1440

§ 15A–298. Subpoena authority

Notes of Decisions

Construction and application 1

1. Construction and application

Appellate court would not consider defendant's argument that state's failure to obtain subpoena to secure records for cellular telephones in his possession warranted suppression of those records, in prosecution for first and second degree murder and robbery with dangerous weapon, where defendant did not raise that argument before trial court. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⇐ 1036.1(4)

SUBCHAPTER IV. ARREST

ARTICLE 20

Arrest

§ 15A–401. Arrest by law-enforcement officer

Notes of Decisions

24. —— Evidence, probable or reasonable cause

University police officer lacked probable cause to arrest motorist for violating North Carolina law rendering it illegal to willfully and unlawfully resist, delay, or obstruct public officer in discharging or attempting to discharge duty of his office; officer arrived on scene of traffic stop and learned that another officer planned to issue motorist citation for seat belt violation, during exchange with officers, motorist repeatedly asked for officers' names and badge numbers and raised his voice, as did officers, throughout escalating verbal confrontation, motorist remained in car seat, and time between when officers approached car and when officer arrested motorist was slightly less than two minutes. Bostic v. Rodriguez, 2009, 2009 WL 3642791. Automobiles ⇐ 349(8)

SUBCHAPTER V. CUSTODY

ARTICLE 26

Bail

Part 2. Bail Bond Forfeiture

§ 15A–544.5. Setting aside forfeiture

Notes of Decisions

1. Construction and application

Statute precluding trial court from setting aside a bond forfeiture in "any case" in which State proves that surety had notice or actual knowledge, before executing bond, that defendant had already failed to appear on two or more prior occasions, did not apply to surety's motion to set aside bond forfeiture after defendant was found to have violated probation, as defendant's underlying criminal conduct involving possession of drug paraphernalia, and his related failure to appear on that charge, was not focus of hearing for probation revocation, which was a new case. State v. Dunn, 2009, 685 S.E.2d 526. Bail ⇐ 79(1)

SUBCHAPTER IX. PRETRIAL PROCEDURE

ARTICLE 48

Discovery in the Superior Court

§ 15A–910. Regulation of discovery — Failure to comply

Notes of Decisions

5. Discretion of court

It is within a trial court's sound discretion whether to impose sanctions for a failure to comply with discovery requirements, including whether to admit or exclude evidence. State v. Remley, 2009, 686 S.E.2d 160. Criminal Law ⇐ 627.8(6)

8. Recess or continuance

Trial court's granting of a recess at trial was an adequate remedy for the state's discovery violation in failing to provide in a timely manner defendant's incriminating statement to a detective; trial court granted the recess to provide defendant with an opportunity to prepare, and the trial court indicated it was more than willing to provide defendant with more time to prepare or take other steps as necessary to ensure that defendant received a fair trial. State v. Remley, 2009, 686 S.E.2d 160. Criminal Law ⇐ 627.8(6)

ARTICLE 53

Motion to Suppress Evidence

§ 15A–974. Exclusion or suppression of unlawfully obtained evidence

Notes of Decisions

32. Waiver of rights

Appellate court would not consider defendant's argument that state's failure to obtain subpoena to secure records for cellular telephones in his possession warranted suppression of those records, in prosecution for first and second degree murder and robbery with dangerous weapon, where defendant did not raise that argument before trial court. State v. Stitt, 2009, 2009 WL 5174377. Criminal Law ⇐ 1036.1(4)

§ 15A–975. Motion to suppress evidence in superior court prior to trial and during trial

Notes of Decisions

2. Motion made at trial—In general

A defendant may move to suppress evidence once trial proceedings have commenced (1) if he did not have a reasonable opportunity to make the motion before trial, or (2) if the State has not given the defendant sufficient advance notice of its intention to use the evidence, or (3) when additional facts are discovered after a pre-trial motion has been denied that could not have been discovered with reasonable diligence before. State v. Paige, 2010, 2010 WL 537461. Criminal Law ⇐ 394.6(3)

17. Review

Drug trafficking defendant's motion to suppress evidence, filed during trial, was made nearly seven weeks after notice that state intended to use seized evidence and thus was untimely in light of lack of any explanation as to why defendant delayed in filing the motion or any indication that defendant had discovered additional facts. State v. Paige, 2010, 2010 WL 537461. Criminal Law ⇐ 394.6(3)

Detective's testimony that he asked defendant's sister if he could search defendant's car, which sister was driving, was sufficient to support finding that sister gave consent to search of the vehicle, despite sister's trial testimony that she told detective to ask defendant, as it was his car. State v. Paige, 2010, 2010 WL 537461. Searches and Seizures ⇐ 197

SUBCHAPTER X. GENERAL TRIAL PROCEDURE

ARTICLE 58

Procedures Relating to Guilty Pleas in Superior Court

§ 15A–1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

Notes of Decisions

7. —— Coercion or threats, voluntariness of plea

Evidence was insufficient to establish that the State brought improper pressure upon defendant to induce his guilty plea to felony child abuse, even though defendant's plea offer was a "package deal" under which defendant's wife would be offered a plea agreement for the same offense only if defendant agreed to plead guilty; there was a sufficient factual basis for the plea, and defendant was not threatened with a sentence more severe that would normally be imposed for pleading not guilty. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇦ 273.1(2)

§ 15A–1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required

Notes of Decisions

3. Voluntariness of plea, generally

The trial court made an adequate inquiry in to the voluntariness of defendant's *Alford* plea, and thus vacation of felony child abuse conviction was not required; the trial court personally addressed defendant and confirmed that defendant had read the transcript of plea and understood the questions in the transcript, and the court verbally asked defendant the same questions in the transcript of plea regarding voluntariness of the plea. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇦ 273.1(4)

6. Informed choice

The trial court adequately determined that defendant's plea was a product of defendant's informed choice; the trial judge addressed defendant and inquired whether defendant understood the nature of the charges, understood that he had a right to plead not guilty, had reviewed and understood the transcript of plea, was satisfied with his lawyer's services, and understood that he was waiving his right to a trial by jury. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇦ 273.1(4)

8. —— Indirect and collateral consequences, advising defendant of consequences of plea

The trial judge's failure to inform defendant that by entering an *Alford* plea defendant would be treated as guilty did not warrant vacation of his conviction for felony child abuse; defendant signed the transcript of plea, which indicated that upon entry of his *Alford* plea defendant would be treated as guilty whether or not he admitted that he was in fact guilty, and the trial judge referred to defendant's plea as a guilty plea multiple times. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇦ 273.1(4); Criminal Law ⇦ 1167(5)

Failure of trial court to advise defendant, before accepting his guilty plea to taking indecent liberties with a minor, that he might be subjected to lifetime satellite-based monitoring did not serve to invalidate the resulting conviction; the monitoring was not an automatic result of defendant's plea. State v. Vogt, 2009, 685 S.E.2d 23. Criminal Law ⇦ 273.1(4)

10. —— Sentencing consequences, advising defendant of consequences of plea

Defendant's conviction for felony child abuse did not have to be vacated due to the trial judge's failure to inform defendant of the maximum sentence for which defendant was being sentenced; even though the worksheet attached to defendant's transcript of plea incorrectly stated that the maximum sentence was 89 months, when it in fact was 98 months, there was no evidence that defendant would have changed his plea if he had been informed of the correct maximum sentence, given that defendant pled guilty pursuant to an *Alford* plea for the purpose of protecting his wife and children. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇦ 1167(5)

12. Factual basis for plea

The trial court adequately determined that a factual basis existed for defendant's guilty plea to felony child abuse; the trial court conducted a colloquy with defendant regarding his understanding of the charges against him and his entry of a guilty plea, and the trial court accepted evidence from both parties in the form of testimony from the victim and defendant's expert witness. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇦ 273(4.1)

The trial court adequately determined that a factual basis existed for defendant's *Alford* plea to felony child abuse; the department of social ser-

vices (DSS) attorney testified that defendant's son was given limited food, that he had to "earn his way to have regular meals," and that he gained approximately ten pounds in one week after he escaped from his home and was hospitalized. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇐ 273(4.1)

21. Review

Trial court erred when it failed to follow the statutory procedure for accepting defendant's guilty plea; the trial judge did not personally address defendant and inform him of his right to remain silent. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇐ 273.1(4)

Failure to strictly adhere to the requirements of statute for accepting a guilty plea does not entitle defendant to have the judgment vacated; a defendant must show that he was prejudiced as a result of the error. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇐ 1167(5)

When assessing whether defendant was prejudiced by non-compliance with statute governing the acceptance of guilty pleas, the courts must look to a totality of the circumstances surrounding the acceptance of the plea and determine whether non-compliance with the statute either affected defendant's decision to plead or undermined the plea's validity. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇐ 1167(5)

Trial court error in failing to follow the statutory procedure for accepting defendant's guilty plea was harmless, even though the trial judge did not personally address defendant and inform him of his right to remain silent, where defendant signed the transcript of plea that stated he understood that he had the right to remain silent. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇐ 1167(5)

§ 15A–1022.1. Procedure in accepting admissions of the existence of aggravating factors in felonies.

Notes of Decisions

Construction and application 1

1. Construction and application

Statutory provisions requiring state to provide notice of its intent to use aggravating factors or prior record level points, setting forth procedure to determine prior record level points not involving prior convictions, and requiring trial court to determine there was factual basis for admission prior to accepting admission were not in effect at time defendant committed instant offenses, and thus defendant challenging his prior record level could not raise arguments on appeal based upon those provisions. State v. Henderson, 2009, 2009 WL 5174281. Criminal Law ⇐ 1181(2)

§ 15A–1025. Plea discussion and arrangement inadmissible

Notes of Decisions

4. Plea discussions, negotiations and agreements

The trial court erred when it allowed the prosecutor to cross-examine defendant concerning a prior guilty plea to a lesser charge that was part of a plea bargain, in prosecution for first degree burglary; statute provided that the fact that a defendant had engaged in plea discussion or made a plea agreement could not be received into evidence in any criminal or civil action. State v. Riley, 2010, 2010 WL 348261.

5. Review

Trial court error in allowing the prosecutor to cross-examine defendant concerning a prior guilty plea to a lesser charge that was part of a plea bargain did not prejudice defendant, in prosecution for first degree burglary; the trial court gave a limiting instruction to the jury that evidence of a prior criminal charge was not to be used as evidence of defendant's guilt in the instant case. State v. Riley, 2010, 2010 WL 348261.

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT

ARTICLE 73

Criminal Jury Trial in Superior Court

§ 15A–1230. Limitations on argument to the jury

Notes of Decisions

21. —— Harmless or reversible error, review

The prosecutor's improper closing argument comments, which speculated that defendant changed his story after speaking with his attorney, did not deprive defendant of a fair trial, in prosecution for first degree burglary; the trial court in-

structed the jurors that their decision was to be made on the basis of their recollection of the evidence alone, and not on the recollection of the evidence as argued by the attorneys, and the weight of evidence against defendant was substantial. State v. Riley, 2010, 2010 WL 348261.

§ 15A–1231. Jury instructions

Notes of Decisions

2. In general

A trial judge is required to instruct the jury on the law arising on the evidence. State v. West, 2010, 2010 WL 537498. Criminal Law ⇐ 770(1)

13. —— Harmless or reversible error, review

The trial court's failure to provide a jury instruction defining "aggravating factor" at sentencing did not constitute reversible error, in prosecution for murder; defendant failed to submit a requested instruction in writing to the trial court. State v. Simonovich, 2010, 2010 WL 309668. Criminal Law ⇐ 828; Criminal Law ⇐ 1177.3(2)

§ 15A–1232. Jury instructions; explanation of law; opinion prohibited

Notes of Decisions

III. NECESSITY, REQUISITES AND SUFFICIENCY OF INSTRUCTIONS

112. Duty of judge, necessity, requisites and sufficiency of instructions—In general

A trial judge is required to instruct the jury on the law arising on the evidence. State v. West, 2010, 2010 WL 537498. Criminal Law ⇐ 770(1)

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS

ARTICLE 81B

Structured Sentencing of Persons Convicted of Crimes

Part 2. Felony Sentencing

§ 15A–1340.13. Procedure and incidents of sentence of imprisonment for felonies

Notes of Decisions

3. Discretion of court

The trial court abused its discretion when it found the existence of extraordinary mitigating factors, when imposing sentence for first degree burglary; the court found the existence of two normal mitigating factors. State v. Riley, 2010, 2010 WL 348261.

§ 15A–1340.14. Prior record level for felony sentencing

Notes of Decisions

11. Offenses committed in other states

Whether an out-of-state offense is substantially similar to offense in state, for purposes of calculating a defendant's prior record level, is question of law that must be determined by trial court, not jury. State v. Henderson, 2009, 2009 WL 5174281. Sentencing and Punishment ⇐ 329

Determining a defendant's prior record level involves complicated calculation of rules and statutory applications, which is mixed question of law and fact; fact is the fact of conviction, which under *Blakely* is not question for jury, and law is proper application of law to fact of the defendant's criminal record, which often involves comparing elements of defendant's prior convictions under statutes of foreign jurisdictions with elements of crimes under state's statutes. State v. Henderson, 2009, 2009 WL 5174281. Sentencing and Punishment ⇐ 329

Comparison of elements of out-of-state criminal offense to those of criminal offense in state, for purposes of calculating a defendant's prior record level, does not require resolution of disputed facts; rather, it involves statutory interpretation, which is

question of law. State v. Henderson, 2009, 2009 WL 5174281. Sentencing and Punishment ⇐ 329

A defendant's stipulation to an out-of-state felony conviction alone is not sufficient to support higher classification for sentencing purposes. State v. Henderson, 2009, 2009 WL 5174281. Sentencing and Punishment ⇐ 323

Whether defendant's prior out-of-state convictions were substantially similar to offenses in North Carolina, for purposes of calculating prior record points, was question of law for trial court to determine and which could not be stipulated to by defendant, in sentencing for rape, burglary, kidnapping, and sexual offense convictions. State v. Henderson, 2009, 2009 WL 5174281. Sentencing and Punishment ⇐ 329

15. Proof of prior offenses

Printed-out e-mail, which contained a screenshot from the Administrative Office of the Courts (AOC) computerized criminal record system showing defendant's prior conviction for assault by pointing a gun, was a "copy" of a record maintained electronically by the AOC and thus was sufficient to prove defendant's prior conviction for sentencing purposes; e-mail contained a copy of the AOC record of the defendant's conviction and contained defendant's name, date of birth, case number, charged offense, arrest date, location of arrest and the names of defendant's attorney and the victim. State v. Best, 2010, 2010 WL 702776. Sentencing and Punishment ⇐ 982

Printed-out e-mail, which contained a screenshot from the Administrative Office of the Courts (AOC) computerized criminal record system showing defendant's prior conviction for assault by pointing a gun, contained sufficient identifying information with respect to defendant to give it the indicia of reliability to prove defendant's prior convictions for sentencing purposes; e-mail contained a copy of the AOC record of the defendant's conviction and contained defendant's name, date of birth, case number, charged offense, arrest date, location of arrest and the names of defendant's attorney and the victim. State v. Best, 2010, 2010 WL 702776. Sentencing and Punishment ⇐ 982

18. Sufficiency of evidence of prior offenses

The State failed to present sufficient evidence to support sentencing defendant as a prior record level four offender, and thus remand for resentencing was required; defendant did not stipulate to any prior convictions, and the prosecutor failed to submit a copy of the original court record of defendant's prior convictions or a copy of the records maintained by the Division of Criminal Information. State v. Jacobs, 2010, 2010 WL 348403. Criminal Law ⇐ 1181.5(8); Sentencing and Punishment ⇐ 1381(2)

Evidence at sentencing was sufficient to establish that defendant had been convicted of certain of-our-state convictions; the State tendered defendant's criminal history printout from the federal Bureau of Investigation's (FBI) National Crime Information Center (NCIC) database, the printout reported defendant's convictions in Virginia and New York and showed defendant's name, date of birth, sex, race, height, weight, eye color, hair color, scars, and tattoos, thereby allowing the court to compare the characteristics listed to those of defendant, and the State tendered a document from the attorney's office in Virginia detailing a conviction in the state. State v. Fortney, 2010, 2010 WL 59252. Sentencing and Punishment ⇐ 323

19. Remand

Remand was required to allow the trial court to determine whether defendant's New York conviction for assault was substantially similar to the North Carolina offense, prior to the court assigning prior record level points during sentencing. State v. Fortney, 2010, 2010 WL 59252. Criminal Law ⇐ 1181.5(8)

Remand for resentencing was required, since state failed to demonstrate to trial court substantial similarity of defendant's out-of-state convictions to North Carolina crimes which would carry sentencing points as assigned by trial court, and since appellate court did not have information necessary to conduct its own substantial similarity analysis for harmless error purposes. State v. Henderson, 2009, 2009 WL 5174281. Criminal Law ⇐ 1181.5(8)

20. Review

Defendant's conviction in Virginia for possession of a firearm by a convicted felon was substantially similar to the North Carolina offense of possession of a firearm by a felon, and thus the court could use defendant's Virginia conviction when assigning prior record level points during sentencing; the Virginia possession of firearms by convicted felons prohibited a person convicted of a felony of knowingly and intentionally possession or transporting any firearm, and the North Carolina possession of a firearm by a felon statute prohibited a convicted felon from purchasing, owning, possessing, or having in his custody, care, or control any firearm. State v. Fortney, 2010, 2010 WL 59252. Sentencing and Punishment ⇐ 95

Any error resulting from trial court's calculation of defendant's prior record level, in sentencing for rape, burglary, kidnapping, and sexual offense convictions, was not harmless; it could not be said that there was not reasonable possibility that, but for trial court's error, defendant would not have been sentenced at lower prior record level. State v. Henderson, 2009, 2009 WL 5174281. Criminal Law ⇐ 1177.3(1)

Appellate court would not speculate as to whether state had for first time, in its brief on appeal, properly identified out-of-state statutes for comparison to North Carolina statutes for purposes of calculating defendant's prior record level. State v. Henderson, 2009, 2009 WL 5174281. Criminal Law ⇐ 1128(2)

§ 15A–1340.15. Multiple convictions

Notes of Decisions

Aggravating factors, consolidated cases 4.1
Consolidated cases 4, 4.1
Aggravating factors 4.1

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4. Consolidated cases—In general

In situations where a defendant is convicted of two or more offenses, the General Assembly has given the trial court discretion to consolidate the offenses into a single judgment for sentencing purposes. State v. Jacobs, 2010, 2010 WL 309456. Sentencing and Punishment ⇐ 501

Under the Structured Sentencing Act, when separate offenses of different class levels are consolidated for judgment, the trial judge is required to enter a sentence for the conviction at the highest class. State v. Jacobs, 2010, 2010 WL 309456. Sentencing and Punishment ⇐ 501

4.1. —— Aggravating factors, consolidated cases

Since the trial judge is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment, aggravating factors applied to the sentence for a consolidated judgment will apply, for purposes of departing from sentencing guidelines, only to the most serious offense in that judgment. State v. Jacobs, 2010, 2010 WL 309456. Sentencing and Punishment ⇐ 145; Sentencing and Punishment ⇐ 501

Trial court, sentencing defendant under a consolidated judgment of conviction for offenses of first-degree burglary, robbery with a dangerous weapon, and impersonating a law enforcement officer, was required to make findings of aggravating factors as to burglary offense, the most serious offense in the judgment, rather than as to the impersonating offense; trial court's findings form stated that aggravating factors were being found as to impersonating offense, and court referred to findings applied to "this crime," suggesting that court was focused on only a single offense. State v. Jacobs, 2010, 2010 WL 309456. Sentencing and Punishment ⇐ 145; Sentencing and Punishment ⇐ 501

§ 15A–1340.16. Aggravated and mitigated sentences

Notes of Decisions

2. Construction and application

A trial court is not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation. State v. Allen, 2009, 684 S.E.2d 526. Sentencing and Punishment ⇐ 372

9. Aggravating factors—In general

Since the trial judge is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment, aggravating factors applied to the sentence for a consolidated judgment will apply, for purposes of departing from sentencing guidelines, only to the most serious offense in that judgment. State v. Jacobs, 2010, 2010 WL 309456. Sentencing and Punishment ⇐ 145; Sentencing and Punishment ⇐ 501

The policy supporting using, as an aggravating factor in sentencing, a finding that a defendant committed offense against a physically infirm victim is to discourage wrongdoers from taking advantage of a victim because of the victim's young or old age or infirmity. State v. Jacobs, 2010, 2010 WL 309456. Sentencing and Punishment ⇐ 121

Two different ways in which a criminal may take advantage of the age of a victim, as an aggravating factor in sentencing: first, he may target the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old; second, the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself. State v. Jacobs, 2010, 2010 WL 309456. Sentencing and Punishment ⇐ 122

Age of a victim should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. State v. Jacobs, 2010, 2010 WL 309456. Sentencing and Punishment ⇐ 122

11. —— Evidence, aggravating factors

Evidence was insufficient to support the aggravating sentencing factor that defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense," in prosecution for statutory sexual offense and multiple counts of indecent liberties; the victim required her mother's permission to spend the night with her friend, who resided with her mother and defendant, and had spent the night there no more than ten times, there was no evidence of a familial relationship between defendant and victim, and there was no evidence that victim would have relied on defendant for help in an emergency. State v. Blakeman, 2010, 2010 WL 348404.

The trial court abused its discretion when it found the existence of extraordinary mitigating factors, when imposing sentence for first degree burglary; the court found the existence of two

normal mitigating factors. State v. Riley, 2010, 2010 WL 348261.

Trial court, sentencing defendant under a consolidated judgment of conviction for offenses of first-degree burglary, robbery with a dangerous weapon, and impersonating a law enforcement officer, was required to make findings of aggravating factors as to burglary offense, the most serious offense in the judgment, rather than as to the impersonating offense; trial court's findings form stated that aggravating factors were being found as to impersonating offense, and court referred to findings applied to "this crime," suggesting that court was focused on only a single offense. State v. Jacobs, 2010, 2010 WL 309456. Sentencing and Punishment ⇦ 145; Sentencing and Punishment ⇦ 501

Evidence supporting finding that, in committing offenses of burglary and kidnapping, defendant induced others to participate in the commission of the offense, was not overwhelming or uncontroverted, and thus trial court's error, in failing to require jury to make finding in aggravation of defendant's sentence, was not harmless; finding was contradicted by co-defendant's testimony that he, not defendant, had planned the crimes and that defendant did no more than answer co-defendant's questions and follow along with the plan. State v. Jacobs, 2010, 2010 WL 309456. Criminal Law ⇦ 1177.3(3)

Evidence supporting finding that, in committing offenses of burglary and kidnapping, defendant took advantage of a position of trust, was overwhelming and uncontroverted, and thus trial court's error, in failing to require jury to make finding in aggravation of defendant's sentence, was harmless; defendant's partners in committing offenses dressed as law enforcement officers, so as to deceive the victims and win their confidence, and entered victims' house, tied them up, and robbed them. State v. Jacobs, 2010, 2010 WL 309456. Criminal Law ⇦ 1177.3(3)

Evidence supporting finding that, in committing offenses of burglary and kidnapping, defendant joined with more than one other person in committing the offenses, was overwhelming and uncontroverted, and thus trial court's error, in failing to require jury to make finding in aggravation of defendant's sentence, was harmless; it was uncontested that offenses were committed by defendant and four other men who entered victim's house, tied up victim and his family, and robbed them. State v. Jacobs, 2010, 2010 WL 309456. Criminal Law ⇦ 1177.3(3)

Evidence supporting finding that, in committing offenses of burglary and kidnapping, defendant committed offenses against an infirm victim, was not overwhelming or uncontroverted, and thus trial court's error, in failing to require jury to make finding in aggravation of defendant's sentence, was not harmless; although victim had suffered heart attacks, had undergone bypass surgery, and had diabetes and high blood pressure, there was no evidence that defendant had chosen victim because of these infirmities, or any evidence that defendant or co-defendants took advantage of victim's infirmities in using trickery to enter victim's house and robbing him. State v. Jacobs, 2010, 2010 WL 309456. Criminal Law ⇦ 1177.3(3)

38. Family relationship to victim

Finding of extenuating relationship between murder defendant and wife, who was his victim, was not compelled by evidence that the victim had repeatedly had extra-marital sexual relationships, and thus the mitigating factor could not be considered at sentencing. State v. Simonovich, 2010, 2010 WL 309668. Sentencing and Punishment ⇦ 73

43. Mitigating factors, generally

Purported mitigating factors did not preclude trial court from sentencing second degree murder defendant within the presumptive range. State v. Allen, 2009, 684 S.E.2d 526. Sentencing and Punishment ⇦ 54

112. Review

Statutory provisions requiring state to provide notice of its intent to use aggravating factors or prior record level points, setting forth procedure to determine prior record level points not involving prior convictions, and requiring trial court to determine there was factual basis for admission prior to accepting admission were not in effect at time defendant committed instant offenses, and thus defendant challenging his prior record level could not raise arguments on appeal based upon those provisions. State v. Henderson, 2009, 2009 WL 5174281. Criminal Law ⇦ 1181(2)

§ 15A–1340.17. Punishment limits for each class of offense and prior record level

Notes of Decisions

Construction with federal law 1.5

1.5. Construction with federal law

Defendant's prior North Carolina convictions for selling cocaine and possession with intent to sell cocaine qualified as serious drug offenses under the Armed Career Criminal Act (ACCA), even though the North Carolina law was amended after his conviction to provide for a maximum sentence of 25 months' imprisonment and the maximum sentence when defendant was convicted was 10 years, where the revised sentencing scheme specifically provided that the revised sentences did not apply to crimes committed before the effective

date of the revisions. U.S. v. McNeill, 2010, 2010 WL 774182.

The defendant's prior conviction under North Carolina law for possession with intent to sell or deliver marijuana was a conviction for a drug offense that was punishable by imprisonment for more than one year, and thus, it constituted a conviction for a "felony drug offense," for purposes of an increased statutory maximum sentence in defendant's sentencing for possession of marijuana with intent to distribute, although defendant received a suspended sentence of six to eight months for the North Carolina conviction, since the maximum sentence under North Carolina law for a defendant with the worst criminal history convicted of the offense with aggravating factors was 15 months. U.S. v. Simmons, 2009, 340 Fed.Appx. 141, 2009 WL 2371939, Unreported. Sentencing and Punishment ⇐ 793

Part 3. Misdemeanor Sentencing

§ 15A–1340.22. Multiple convictions

Notes of Decisions

Construction and application 1
Review 2

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1. Construction and application

Trial court was not authorized to impose consecutive sentences for class I misdemeanor larceny that totaled 150 days' imprisonment; maximum sentence for a class I misdemeanor given defendant's record level was 45 days, and the cumulative length of the sentences could not by statute exceed twice the maximum sentence, or 90 days. State v. Remley, 2009, 686 S.E.2d 160. Sentencing and Punishment ⇐ 594

2. Review

Trial court acted outside its authority by imposing three consecutive terms for misdemeanor offenses for assault, false imprisonment, and false fire alarm, for a total of 165 days, where the total days was in excess of statutory cap of twice the maximum sentence for the most serious misdemeanor conviction, which was 150 days for the 75-day sentence for assault inflicting serious injury. State v. Wheeler, 2010, 2010 WL 309460. Sentencing and Punishment ⇐ 34; Sentencing and Punishment ⇐ 644

§ 15A–1340.23. Punishment limits for each class of offense and prior conviction level

Notes of Decisions

3. Judicial power and duty

Trial court acted outside its authority by imposing three consecutive terms for misdemeanor offenses for assault, false imprisonment, and false fire alarm, for a total of 165 days, where the total days was in excess of statutory cap of twice the maximum sentence for the most serious misdemeanor conviction, which was 150 days for the 75-day sentence for assault inflicting serious injury. State v. Wheeler, 2010, 2010 WL 309460. Sentencing and Punishment ⇐ 34; Sentencing and Punishment ⇐ 644

Article 82

Probation

§ 15A–1343. Conditions of probation

Notes of Decisions

22. Findings

Remand for resentencing was required, where the trial court imposed a 60 month term of probation, and the court failed to make the statutorily required findings for imposing a term of probation longer than 36 months. State v. Riley, 2010, 2010 WL 348261.

§ 15A–1343.2. Special probation rules for persons sentenced under Article 81B

Notes of Decisions

Remand 3

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3. Remand

Remand of trial court order, on entry of suspended sentences for consecutive judgments for assault, inflicting serious injury, false imprisonment, and false fire alarm, in which trial court placed defendant on supervised probation for 24 months to begin after he served his active sentence, was required, for entry of finding that the longer term of probation was necessary. State v. Wheeler, 2010, 2010 WL 309460. Criminal Law ⇦ 1181.5(8)

§ 15A–1345. Arrest and hearing on probation violation

Notes of Decisions

1. In general

Although a probation revocation hearing is only possible after a defendant has been found guilty of underlying criminal conduct, such underlying conduct is entirely distinct from the hearing; rather, the revocation court must determine whether the defendant willfully violated one or more conditions of his probation. State v. Dunn, 2009, 685 S.E.2d 526. Sentencing and Punishment ⇦ 2003

3. Due process

Statute governing arrest for violation of probation guarantees full due process before there can be a revocation of probation and a resulting prison sentence. State v. Dunn, 2009, 685 S.E.2d 526. Constitutional Law ⇦ 4733(1); Sentencing and Punishment ⇦ 2009

Statute governing arrest for violation of probation guarantees notice, bail, a preliminary hearing and a revocation hearing with counsel present. State v. Dunn, 2009, 685 S.E.2d 526. Sentencing and Punishment ⇦ 2009

ARTICLE 83

Imprisonment

§ 15A–1351. Sentence of imprisonment; incidents; special probation

Notes of Decisions

4. Review

Remand for resentencing was required, where the total of all periods of confinement imposed as an incident of special probation could not exceed one-fourth the maximum sentence of imprisonment imposed for the offense, defendant was sentenced to 30 months of special probation, and the maximum period of special probation that could have been imposed was one-fourth of the maximum sentence of 65 months or 16.25 months. State v. Riley, 2010, 2010 WL 348261.

Issue of whether defendant's special-probation jail sentence of four months exceeded the statutory limit was moot on direct appeal, where defendant had already served the four months and did not argue to the appellate court any collateral adverse legal consequences that could result from the length of his sentence. State v. Stover, 2009, 685 S.E.2d 127. Criminal Law ⇦ 1134.26

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL

ARTICLE 91

Appeal to Appellate Division

§ 15A–1442. Grounds for correction of error by appellate division

Notes of Decisions

Nature of lower court proceedings 33

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33. Nature of lower court proceedings

A hearing on a petition for satellite based monitoring (SBM) was a civil, rather than criminal, proceeding, for appeal purposes; there is no jury and no sentence in a SBM proceeding, and there is no entry of a plea of guilty, not guilty, or no contest. State v. Singleton, 2010, 2010 WL 59255. Mental Health ⇦ 469(6)

§ 15A–1443. Existence and showing of prejudice

Notes of Decisions

I. PREJUDICE TO DEFENDANT

7. —— Matter of law, prejudice to defendant

Allowing officer's lay opinion testimony identifying defendant as person depicted in video surveillance footage prejudiced defendant; record reflected that state's case rested exclusively on surveillance video and officer's identification testimony, state offered no fingerprint evidence, DNA evidence, or other identification testimony, because witness was police officer with 18 years of experience, jury likely gave significant weight to testimony, testimony identifying individual in video as defendant played significant if not vital role in state's case, making it reasonably possible that, had testimony been excluded, different result would have been reached at trial. State v. Belk, 2009, 2009 WL 5174093.

13. Transcripts

Defendant failed to establish that any error in admitting transcript of defendant's prior testimony at juvenile hearing instead of recording was prejudicial error at felony child abuse trial; original recording had been provided to defendant and could have been offered into the evidence if defendant so desired, but defendant never offered the recording as evidence and did not request that the jury be permitted to hear the recording, there was no dispute as to the accuracy of the transcript, and defendant failed to include the recording as part of the record on appeal. State v. Haas, 2010, 2010 WL 348260. Criminal Law ⇦ 1169.1(10)

IV. PREJUDICIAL ERROR IN ADMISSION OF EVIDENCE

206. Testimonial evidence, prejudicial error in admission of evidence

Trial court error in allowing the prosecutor to cross-examine defendant concerning a prior guilty plea to a lesser charge that was part of a plea bargain did not prejudice defendant, in prosecution for first degree burglary; the trial court gave a limiting instruction to the jury that evidence of a prior criminal charge was not to be used as evidence of defendant's guilt in the instant case. State v. Riley, 2010, 2010 WL 348261.

V. ERROR HARMLESS BEYOND REASONABLE DOUBT

249. Examination of witnesses, error harmless beyond reasonable doubt—In general

The trial court's act of allowing the prosecutor and State's witnesses to refer to the complainant as the "victim" did not constitute plain error, in prosecution for taking indecent liberties with a child and statutory rape. State v. Jackson, 2010, 2010 WL 537460. Criminal Law ⇦ 1036.1(3.1)

§ 15A–1444. When defendant may appeal; certiorari

Notes of Decisions

Nature of lower court proceedings 38

16. —— Motion to withdraw plea denied, guilty plea

The Court of Appeals had jurisdiction to review defendant's appeal of order denying his motion to withdraw his *Alford* guilty plea; defendant's motion to withdraw his plea was a motion for appropriate relief, and statute provided that a ruling on a motion for appropriate relief was subject to review by appeal. State v. Salvetti, 2010, 2010 WL 309675. Criminal Law ⇦ 1023(3)

38. Nature of lower court proceedings

A hearing on a petition for satellite based monitoring (SBM) was a civil, rather than criminal, proceeding, for appeal purposes; there is no jury and no sentence in a SBM proceeding, and there is no entry of a plea of guilty, not guilty, or no contest. State v. Singleton, 2010, 2010 WL 59255. Mental Health ⇦ 469(6)

§ 15A–1446. Requisites for preserving the right to appellate review

Notes of Decisions

36. Sentence or judgment

A defendant's failure to specifically object to a trial court's entry of an award of restitution does not preclude appellate review of the award. State v. Mauer, 2010, 2010 WL 537493. Criminal Law ⇦ 1042.3(5)

Defendant's silence while the trial court orally entered judgment against her for misdemeanor cruelty to animals did not constitute a stipulation to amount of restitution. State v. Mauer, 2010, 2010 WL 537493. Sentencing and Punishment ⇦ 2138; Stipulations ⇦ 7

SUBCHAPTER XV. CAPITAL PUNISHMENT

ARTICLE 100

Capital Punishment

§ 15A–2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

Notes of Decisions

240. Habeas corpus generally

Witness affidavit expressing some reservation about how to characterize conduct of capital murder defendant after he shot victim did not meet extraordinarily high showing that was needed to raise colorable freestanding innocence claim on federal petition for writ of habeas corpus. Hooks v. Branker, 2009, 2009 WL 3403315, Unreported. Habeas Corpus ⇦ 462

Chapter 20

Motor Vehicles

ARTICLE 2

Uniform Driver's License Act

§ 20–16.2. Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis

Notes of Decisions

Affidavit, willful refusal 17.5
Willful refusal 16–20
Affidavit 17.5

17.5. —— Affidavit, willful refusal

Division of Motor Vehicles never received a statutorily-required affidavit indicating that motorist had refused to submit to blood-alcohol test, and thus Division lacked authority to revoke motorist's driving privileges for refusal to take test, where police officer who had stopped motorist, and to whom motorist had refused to submit to test, failed to mark portion of affidavit indicating that motorist had refused to submit to testing; printed box on affidavit form, next to statement "driver willfully refused to submit to a chemical analysis as indicated on the attached form," was left blank rather than check-marked. Lee v. Gore, 2010, 2010 WL 313444. Automobiles ⇦ 144.2(1)

§ 20–16.3A. Checking stations and roadblocks

Notes of Decisions

Reasonableness of checkpoint 5
Review 4

2. Purpose

Primary programmatic purpose of license checkpoint, at which motorist was arrested by state trooper for driving while impaired, namely, enforcement of state's motor vehicle laws, was lawful, and checkpoint, at which license checks were conducted systematically, was tailored to fit that purpose. State v. Veazey, 2009, 2009 WL 5174375. Automobiles ⇦ 349(9)

3. Admissibility of evidence

Trial court's findings of fact, on motion to suppress in prosecution to driving while impaired, that in selecting particular portion of highway for license checkpoint, state trooper was aware of numerous violations of motor vehicle violations, that trooper had been successful in past with checkpoints at that location, and that primary programmatic purpose of checkpoint was to determine if drivers were duly licensed and observing motor vehicle laws were supported by competent evidence. State v. Veazey, 2009, 2009 WL 5174375. Criminal Law ⇦ 394.6(4)

4. Review

In evaluating constitutionality of checkpoint, reviewing court must first determine primary programmatic purpose of checkpoint under *City of Indianapolis v. Edmond*, and if purpose is valid, must consider whether checkpoint was reasonable under balancing test articulated in *Brown v. Texas*.

West's N.C.G.S.A. State v. Veazey, 2009, 2009 WL 5174375. Arrest ⇐ 63.5(6)

State trooper complied with statutory requirements for conducting checkpoint; checkpoint was organized pursuant to predetermined plan, and license check was conducted systematically, every vehicle was stopped, and every driver was asked to produce driver's license and proof of registration. State v. Veazey, 2009, 2009 WL 5174375. Automobiles ⇐ 349(9)

License checkpoint at which motorist was arrested for driving while impaired was reasonable; state had strong interest in enforcing motor vehicle laws, checkpoint was tailored to meet that purpose, and checkpoint constituted minimal intrusion on drivers' liberty. State v. Veazey, 2009, 2009 WL 5174375. Automobiles ⇐ 349(9)

5. Reasonableness of checkpoint

Determination regarding reasonableness of checkpoint is made by weighing gravity of public concerns served by seizure, degree to which seizure advances public interest, and severity of interference with individual liberty. State v. Veazey, 2009, 2009 WL 5174375. Arrest ⇐ 63.5(6)

Article 3

Motor Vehicle Act of 1937

Part 8. Anti-Theft and Enforcement Provisions

§ 20–111. Violation of registration provisions

Notes of Decisions

Validity ½

½. Validity

Motor vehicle registration and financial responsibility statutes were legitimate exercises of the state's police power that did not violate defendant's right to travel. State v. Sullivan, 2009, 2009 WL 5067454.

Motor vehicle registration statute, providing that it is unlawful "to drive a vehicle on a highway, or knowingly permit a vehicle owned by that person to be driven on a highway, when the vehicle is not registered with the Division in accordance with this Article or does not display a current registration plate," gives fair notice necessary to enable anyone operating a motor vehicle to conform their conduct to the law and thus is not void for vagueness. State v. Sullivan, 2009, 2009 WL 5067454.

1. Construction and application

Purpose of the vehicle registration statute is that the vehicle should be readily identified in order to debar operators from violating the law and the rights of others, and to enforce the laws regulating the speed, and to hold the operator responsible in cases of accident. State v. Sullivan, 2009, 2009 WL 5067454.

Part 9. The Size, Weight, Construction and Equipment of Vehicles

§ 20–118. Weight of vehicles and load

Notes of Decisions

3. Penalties

Department of Crime Control and Public Safety was substantially justified in issuing overweight penalty to trucking company based on difference between actual weight of tractor trailer and statutory maximum, and, thus, trial court erred by reaching contrary conclusion in awarding attorney fees to company, although actual weight of truck did not violate weight limit specified in special permit; Department's construction of relevant statutory language had some level of support, and precedent which held otherwise was issued after penalty was imposed. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. Automobiles ⇐ 15

§ 20–119. Special permits for vehicles of excessive size or weight; fees

Notes of Decisions

3. Penalties

Department of Crime Control and Public Safety was substantially justified in issuing overweight penalty to trucking company based on difference between actual weight of tractor trailer and statutory maximum, and, thus, trial court erred by reaching contrary conclusion in awarding attorney fees to company, although actual weight of truck did not violate weight limit specified in special permit; Department's construction of relevant statutory language had some level of support, and precedent which held otherwise was issued after penalty was imposed. Daily Exp., Inc. v. Beatty, 2010, 2010 WL 537614. Automobiles ⇐ 15

Part 10. Operation of Vehicles and Rules of the Road

§ 20–138.5. Habitual impaired driving

Notes of Decisions

4. Indictment

Amendment of indictment as to provide for a ten-year as opposed to a seven-year "look-back" period relative to prior driving while impaired (DWI) convictions, for purposes of accurately reflecting language of recently amended habitual impaired driving statute, did not amount to a substantial alteration, and thus, State was appropriately permitted to amend indictment; indictment at all times alleged the essential elements of the crime, and the incorrect recitation in the indictment of a seven-year look-back period was not essential to the indictment. State v. White, 2010, 2010 WL 537616.

§ 20–139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled–drinking programs

Notes of Decisions

2. Validity

Statute allowing a police officer to compel a person to provide a blood sample for alcohol testing without a warrant under certain circumstances does not violate the constitutional guarantee of freedom from unreasonable searches and seizures; the statute requires both probable cause and an officer's reasonable belief that a delay in testing would result in dissipation of the person's blood alcohol content, i.e., exigent circumstances. State v. Fletcher, 2010, 2010 WL 313748. Automobiles ⇦ 412

16. —— Sequential breath tests

Results obtained from two of four attempted breath samples collected within reasonable time met consecutively administered tests requirement for statute requiring sequential testing. State v. Shockley, 2009, 2009 WL 5174097. Automobiles ⇦ 422.1

18. —— Admissibility of evidence, blood tests

Record supported a determination that exigent circumstances existed to justify a warrantless withdrawal of a sample of defendant's blood for alcohol testing; defendant had failed multiple field-sobriety tests and was unsuccessful at producing a valid breath sample, a police officer testified that a magistrate's office was 12 miles away and that the office and the hospital were often busy on weekend nights, and any alcohol in defendant's blood was being eliminated at a constant rate. State v. Fletcher, 2010, 2010 WL 313748. Automobiles ⇦ 419

21. —— Time for tests, blood tests

Record supported a determination that police officer had a reasonable belief that a delay caused by obtaining a court order would result in the dissipation of the percentage of alcohol in defendant's blood, so as to allow officer to compel defendant to provide a blood sample without a court order, given that defendant refused to submit to a test; officer testified that a magistrate's office was 12 miles away and that the office and the hospital were often busy on weekend nights, and officer opined that the entire process of driving to the magistrate's office, standing in line, filling out the required forms, returning to the hospital, and having defendant's blood drawn would have taken two to three hours. State v. Fletcher, 2010, 2010 WL 313748. Automobiles ⇦ 419

§ 20–141.4. Felony and misdemeanor death by vehicle; felony serious injury by vehicle; aggravated offenses; repeat felony death by vehicle

Notes of Decisions

14. Weight and sufficiency of evidence—In general

Evidence of defendant's impairment is required before charges of driving while impaired and driving while impaired causing serious injury may be submitted to a jury. State v. Mumford, 2010, 2010 WL 59289. Automobiles ⇦ 356(6)

15. —— Impaired driving, weight and sufficiency of evidence

State's evidence was sufficient for a reasonable juror to conclude that defendant was driving while impaired, and thus, evidence was sufficient to submit the charge of driving while impaired causing serious injury to jury; although almost three-hours elapsed between the accident and the administration of intoxilyzer test, at that time the intoxilyzer test registered defendant's blood alcohol concentration at .09, State relied on officer's observations to conclude that there was substantial evidence for jury to determine that defendant was impaired at the time of the accident, and before accident, defendant drank a 32–ounce beer, had a shot of liquor, and had two more swallows of beer. State v. Mumford, 2010, 2010 WL 59289. Automobiles ⇦ 356(6)

21. Review

Jury verdicts convicting defendant of felony driving while impaired inflicting serious injury and acquitting defendant of driving while impaired were inconsistent and contradictory, and thus the trial court should have declined to accept the verdicts, reinstructed the jury, and directed it to retire and deliberate further; elements of the greater crime (felony driving while impaired causing serious injury) statutorily required conviction of the lesser crime (driving while impaired). State v. Mumford, 2010, 2010 WL 59289. Criminal Law ⚿ 878(4)

Article 13

The Vehicle Financial Responsibility Act of 1957

§ 20–309. Financial responsibility prerequisite to registration; must be maintained throughout registration period

Notes of Decisions

Validity ½

½. Validity

Motor vehicle financial responsibility statutes, which provide that "any owner of a motor vehicle registered or required to be registered in this State who shall operate or permit such motor vehicle to be operated in this State without having in full force and effect the financial responsibility required by this Article" and that "Financial responsibility shall be a liability insurance policy or a financial security bond or a financial security deposit or by qualification as a self-insurer," as described in statute, give fair notice necessary to enable anyone operating a motor vehicle to conform their conduct to the law and thus are not void for vagueness. State v. Sullivan, 2009, 2009 WL 5067454.

§ 20–313. Operation of motor vehicle without financial responsibility a misdemeanor

Notes of Decisions

Validity ½

½. Validity

Motor vehicle registration and financial responsibility statutes were legitimate exercises of the state's police power that did not violate defendant's right to travel. State v. Sullivan, 2009, 2009 WL 5067454.

Motor vehicle financial responsibility statutes, which provide that "any owner of a motor vehicle registered or required to be registered in this State who shall operate or permit such motor vehicle to be operated in this State without having in full force and effect the financial responsibility required by this Article" and that "Financial responsibility shall be a liability insurance policy or a financial security bond or a financial security deposit or by qualification as a self-insurer," as described in statute, give fair notice necessary to enable anyone operating a motor vehicle to conform their conduct to the law and thus are not void for vagueness. State v. Sullivan, 2009, 2009 WL 5067454.

1. Construction and application

Purpose of financial responsibility requirements statute is to protect the public on the highways against the operation of motor vehicles by reckless and irresponsible persons, a duty which is inherent in every sovereign government and is a proper exercise of police power. State v. Sullivan, 2009, 2009 WL 5067454.

Chapter 22

Contracts Requiring Writing

§ 22–1. Contracts charging representative personally; promise to answer for debt of another

Notes of Decisions

5. Agreements that need not be in writing—In general

Alleged brokerage contract between real estate agent and purchasers did not have to be in writing to be enforceable. Scheerer v. Fisher, 2010, 2010 WL 313700. Brokers ⇦ 43(1)

Chapter 25

Uniform Commercial Code

Article 1

General Provisions

PART 2. General Definitions and Principles of Interpretation

§ 25–1–201. General definitions

Notes of Decisions

17. Security interest—In general

Trustee did not have a right to foreclose on property referenced in deed of trust which contained future advance clause that permitted the grantor to secure future obligations under the deed of trust, where first promissory note, secured by deed of trust, to debtors and grantors as co-signers was paid in full such that security interest became null and void, later guaranty in which grantor agreed to pay indebtedness of debtors did not convey any security interest or refer to any right to foreclosure, and later unpaid promissory notes were made only to debtors and not to grantor. Trustee Services, Inc. v. R.C. Koonts and Sons Masonry, Inc., 2010, 2010 WL 348185. Mortgages ⇦ 121; Mortgages ⇦ 298(4); Mortgages ⇦ 335

Article 2

Sales

Part 4. Title, Creditors and Good Faith Purchasers

§ 25–2–401. Passing of title; reservation for security; limited application of this section

Notes of Decisions

1. Construction and application

The sale, distribution, manufacture, possession, and transport of controlled substances is governed by the Controlled Substances Act and not by the Uniform Commercial Code. State v. Freeman, 2010, 2010 WL 702461. Controlled Substances ⇦ 22; Controlled Substances ⇦ 23; Controlled Substances ⇦ 25; Controlled Substances ⇦ 33

Part 7. Remedies

§ 25–2–719. Contractual modification or limitation of remedy

Notes of Decisions

2. Construction of contract

Limited warranty for allegedly defective product used to construct home did not fail of its essential purpose and thus provided adequate remedy under North Carolina law for homeowner seeking recovery against manufacturers and designers for damage allegedly cause to home by product, despite warranty's remedy cap of double the product's sales price, where warranty promised replacement of product with similar product in the event that product was defective by design. Kelly v. Georgia-Pacific LLC, 2009, 2009 WL 4249587. Sales ⇨ 426

Article 3

Negotiable Instruments

[Revised]

PART 6. Discharge and Payment

§ 25–3–605. Discharge of indorsers and accommodation parties

Notes of Decisions

6. Impairment of collateral

Lienholder did not impair the value of mobile home property, which was destroyed by fire, as required for guarantor's obligation on note secured by property to be discharged to the extent of the impairment, where fire insurance coverage lapsed prior to execution of guaranty contract, and lienholder did not act to void the fire insurance policy. Community One Bank, N.A. v. Bowden, 2010, 2010 WL 348401. Guaranty ⇨ 62

Chapter 35A

Incompetency and Guardianship

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE

Article 1

Determination of Incompetence

§ 35A–1103. Jurisdiction; venue

Notes of Decisions

Construction and application 1

1. Construction and application

Clerk of superior court had original and exclusive jurisdiction, after adult child was adjudicated incompetent, to appoint guardians and to determine disputes between guardians, and therefore, clerk of superior court was proper forum in which to bring custody dispute over adult child whose parents had been appointed guardians but who sought divorce in district court; although district court had concurrent jurisdiction with respect to custody of disabled adult children, it did not have jurisdiction over the custody of an adult disabled child already declared incompetent. McKoy v. McKoy, 2010, 2010 WL 537502.

§ 35A–1116. Costs and fees

Notes of Decisions

1. Construction and application

Trial court properly required the payment from ward's estate of witness fees associated with special needs trust (SNT) trustee's compliance with a subpoena issued by counsel for ward and her husband following restoration of competency to ward. In re Clark, 2010, 2010 WL 348263. Mental Health ⇨ 233

SUBCHAPTER II. GUARDIAN AND WARD

ARTICLE 4

Purpose and Scope; Jurisdiction; Venue

§ 35A–1203. Jurisdiction; authority of clerk

Notes of Decisions

2. Custody disputes

Clerk of superior court had original and exclusive jurisdiction, after adult child was adjudicated incompetent, to appoint guardians and to determine disputes between guardians, and therefore, clerk of superior court was proper forum in which to bring custody dispute over adult child whose parents had been appointed guardians but who sought divorce in district court; although district court had concurrent jurisdiction with respect to custody of disabled adult children, it did not have jurisdiction over the custody of an adult disabled child already declared incompetent. McKoy v. McKoy, 2010, 2010 WL 537502.

ARTICLE 8

Powers and Duties of Guardian of the Person

§ 35A–1241. Powers and duties of guardian of the person

Notes of Decisions

½. Construction and application

Trial court had statutory authority to authorize payment of attorney fees from ward's estate to law firms for legal work performed on behalf of ward and guardian. In re Clark, 2010, 2010 WL 348263. Mental Health ⇨ 233

The employment of counsel for legal advice and assistance in connection with the administration of the ward's estate is a proper expense to be charged by the guardian, if in reasonable amount, and for the benefit of the ward. In re Clark, 2010, 2010 WL 348263. Mental Health ⇨ 233

The guardian of the person is authorized to retain legal counsel on behalf of the ward without the signature of the guardian of the estate. In re Clark, 2010, 2010 WL 348263. Mental Health ⇨ 179

5. Review

Trial court did not abuse its discretion by concluding that guardian's decision to employ law firm to oppose ward's petition for restoration of competency was appropriate, such that law firm's fees should be paid from the ward's estate; ward had long history of substance abuse and suffered from paranoid delusions, petition was filed by ward's husband with whom ward had a volatile relationship, and ward's husband expressed opposition to the existing arrangements for the handling of ward's assets shortly before settlement of personal injury litigation instituted on wards behalf. In re Clark, 2010, 2010 WL 348263. Mental Health ⇨ 233

Trial court did not abuse its discretion by awarding attorney fees from ward's estate to law firm retained by guardian in the establishment of a special needs trust and to perform other legal services for ward relating to the preservation of her assets, even though ward became dissatisfied with firm's services. In re Clark, 2010, 2010 WL 348263. Mental Health ⇨ 233

6. Supervision of guardians

Clerk of superior court had original and exclusive jurisdiction, after adult child was adjudicated incompetent, to appoint guardians and to determine disputes between guardians, and therefore, clerk of superior court was proper forum in which to bring custody dispute over adult child whose parents had been appointed guardians but who sought divorce in district court; although district court had concurrent jurisdiction with respect to custody of disabled adult children, it did not have jurisdiction over the custody of an adult disabled child already declared incompetent. McKoy v. McKoy, 2010, 2010 WL 537502.

Chapter 36C

North Carolina Uniform Trust Code

Article 4

Creation, Validity, Modification, and Termination of Trust

§ 36C–4–412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively

Notes of Decisions

Construction and application 1

1. Construction and application

States were not entitled to modification of trust agreement which resulted from tobacco companies' Master Settlement Agreement (MSA) with various states, and under which annual assistance was provided to tobacco growers, pursuant to statute that allowed court to modify administrative or dispositive terms of trust if, because of unanticipated circumstances, modification would further the purposes of the trust; the passage of the Fair and Equitable Tobacco Reform Act (FETRA), which under the terms of tax offset adjustment (TOA) provision of trust allowed settlors to offset all of their payments made under FETRA without any reference to which states were receiving FETRA benefits, was not an unanticipated circumstance since States knew they were treated differently as a result of their choice to not participate in the federal price control and quota system and knew that they might not be covered by any federal buyout legislation targeting that system. State v. Philip Morris USA Inc., 2009, 363 N.C. 623, 685 S.E.2d 85. Trusts ⇦ 58

Article 7

Office of Trustee

§ 36C–7–709. Reimbursement of expenses

Notes of Decisions

Construction and application 1

1. Construction and application

Trial court properly required the payment from ward's estate of witness fees associated with special needs trust (SNT) trustee's compliance with a subpoena issued by counsel for ward and her husband following restoration of competency to ward. In re Clark, 2010, 2010 WL 348263. Mental Health ⇦ 233

Chapter 40A

Eminent Domain

Article 2

Condemnation Proceedings by Private Condemnors

§ 40A–28. Exceptions to report; hearing; when title vests; appeal; restitution

Notes of Decisions

11. —— Instructions, determination of damages

Trial court's instructions to the jury in just compensation phase of condemnation case, that the easement obtained by power company affected one or both airstrips on landowner's property, and that the power lines were a condemnation of certain activities on the airstrip, were based upon law of the case, and thus, were warranted; issue of whether the easement affected the airstrips was presented in the issues portion of the case, in first appeal power company did not assign error as to the finding that the condemnation affected the airstrips, and the appellate court upheld the condemnation, specifying that it was doing so despite the effect on the airstrips, and then remanded. Prog-

ress Energy Carolinas, Inc. v. Strickland, 2009, 685 S.E.2d 521. Eminent Domain ⇦ 262(4)

Chapter 41

Estates

Article 2

Uniform Statutory Rule Against Perpetuities

§ 41–15. Statutory rule against perpetuities

Notes of Decisions

Construction and application 2

2. Construction and application

Instead of finding a future interest invalid at the time of its creation if it is not certain to vest or terminate within the prescribed period, as was required under the common law rule, a future interest is invalid under the Uniform Statutory Rule Against Perpetuities (USRAP) only if it has not vested or terminated within 90 years of its creation. Brown Bros. Harriman Trust Co., N.A. v. Benson, 2010, 2010 WL 348317. Perpetuities ⇦ 4(1)

§ 41–23. Perpetuities and suspension of power of alienation for trusts

Notes of Decisions

Validity 1

1. Validity

Statute which expressly superseded the common law rule against perpetuities and required the existence of the power of alienation rather than that remote future interests vest or terminate within a certain time period did not violate the state constitution's prohibition against of perpetuities, although it allowed a trust to remain valid in perpetuity as long as the appropriate rights of sale or termination were held. Brown Bros. Harriman Trust Co., N.A. v. Benson, 2010, 2010 WL 348317. Perpetuities ⇦ 6(1); Perpetuities ⇦ 6(2)

Chapter 44A

Statutory Liens and Charges

Article 1

Possessory Liens on Personal Property

§ 44A–3. When lien arises and terminates

Notes of Decisions

Review 7

7. Review

Creditor waived on appeal his claim that, under North Carolina law, he obtained a possessory lien on sewing machine he provided to Chapter 13 debtor under layaway contract, as would preclude debtor's conversion claim, where he did not raise the claim in debtor's adversary proceeding before the bankruptcy court, and he did not establish exceptional circumstances warranting consideration of whether a possessory lien existed or could exist under the circumstances of the case. Hancock v. Renshaw, 2009, 2009 WL 4840231. Bankruptcy ⇦ 3770

Bankruptcy Court's findings of fact that, under North Carolina law, creditor did not have a possessory lien on sewing machine he provided to debtor under layaway contract, and thus he was not entitled to retain the machine until debtor paid for repairs, as would preclude debtor's conversion claim, were not clearly erroneous, where, even if loaner receipt produced by creditor was a security agreement, debtor never signed the receipt. Hancock v. Renshaw, 2009, 2009 WL 4840231. Bailment ⇦ 18(2); Bailment ⇦ 31(3)

ARTICLE 2

Statutory Liens on Real Property

Part 1. Liens of Mechanics, Laborers, and Materialmen Dealing with Owner

§ 44A–8. Mechanics', laborers', and materialmen's lien; persons entitled to claim of lien on real property

Notes of Decisions

Construction with federal law 1.1

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1. In general

North Carolina's mechanic's lien statutes grant a supplier of labor or material only a right to file a mechanic's lien. United Rentals, Inc. v. Angell, 2010, 2010 WL 251594. Mechanics' Liens ⇦ 5

1.1. Construction with federal law

Discharge of inchoate lien rights of company that had supplied Chapter 7 debtor-subcontractor with rental equipment and parts in several construction projects, and that had received from debtor three payments totaling $75,849.40 during the 90-day preference period, did not constitute "new value," for purposes of the contemporaneous exchange for new value exception to trustee's avoidance powers; supplier did not have a security interest to release because it never filed the mechanic's lien claim necessary to obtain such an interest under North Carolina law. United Rentals, Inc. v. Angell, 2010, 2010 WL 251594. Bankruptcy ⇦ 2613(3)

§ 44A–10. Effective date of claim of lien on real property

Notes of Decisions

1. In general

Under North Carolina law, only upon the filing of a claim for a mechanic's lien is the owner's property encumbered. United Rentals, Inc. v. Angell, 2010, 2010 WL 251594. Mechanics' Liens ⇦ 128

§ 44A–13. Action to enforce claim of lien on real property

Notes of Decisions

18. Time of accrual or commencement

Under North Carolina law, once a subcontractor has filed a lien, it may enforce the lien within 180 days after the last furnishing of labor or materials to the real property by filing a lawsuit. United Rentals, Inc. v. Angell, 2010, 2010 WL 251594. Mechanics' Liens ⇦ 260(3)

§ 44A–16. Discharge of record claim of lien on real property

Notes of Decisions

½. Construction and application

Under North Carolina law, a mechanic's lien is discharged by failure to enforce the claim of lien within the prescribed time. United Rentals, Inc. v. Angell, 2010, 2010 WL 251594. Mechanics' Liens ⇦ 260(6)

Part 2. Liens of Mechanics, Laborers, and Materialmen Dealing with One Other Than Owner

§ 44A–23. Contractor's claim of lien on real property; perfection of subrogation rights of subcontractor

Notes of Decisions

1. In general

Under North Carolina law, a first-, second-, or third-tier subcontractor who has furnished rental equipment in the improvement of real property, upon compliance with certain requirements, may enforce the contractor's lien on real property. United Rentals, Inc. v. Angell, 2010, 2010 WL 251594. Mechanics' Liens ⇦ 47

Chapter 47F

North Carolina Planned Community Act

Article 1

General Provisions

§ 47F–1–102. Applicability

Notes of Decisions

3. Construction and application

Planned Community Act did not apply to allow award of attorney fees to homeowners association in action against lot owners for breach of restrictive covenant prohibiting further subdivision of lots, where subdivision was created prior to the Act's effective date, subdivision declaration had not been amended to incorporate the Act, and association commenced action before revisions to Act made attorney fees potentially applicable for their claims, although it filed amended complaint after revisions. Moss Creek Homeowners Ass'n, Inc. v. Bissette, 2010, 2010 WL 356195. Covenants ⇨ 132(2)

Article 3

Management of Planned Community

§ 47F–3–120. Declaration limits on attorneys' fees

Notes of Decisions

1. Construction and application

Planned Community Act did not apply to allow award of attorney fees to homeowners association in action against lot owners for breach of restrictive covenant prohibiting further subdivision of lots, where subdivision was created prior to the Act's effective date, subdivision declaration had not been amended to incorporate the Act, and association commenced action before revisions to Act made attorney fees potentially applicable for their claims, although it filed amended complaint after revisions. Moss Creek Homeowners Ass'n, Inc. v. Bissette, 2010, 2010 WL 356195. Covenants ⇨ 132(2)

Chapter 50

Divorce and Alimony

Article 1

Divorce, Alimony, and Child Support, Generally

§ 50–13.7. Modification of order for child support or custody

Notes of Decisions

13. Custody orders—In general

A decree of child custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. Miller v. Miller, 2009, 2009 WL 5066907. Child Custody ⇨ 531(1); Child Custody ⇨ 554; Child Custody ⇨ 555

44.5. Temporary custody or visitation orders

Evidence was sufficient to support finding that child custody matter did not lie dormant after consent order was entered in divorce action, and thus that consent order remained a temporary child custody order such that court considering child custody two years after the entry of the consent order could use the best interest of the child standard to establish child custody rather than reviewing the evidence for a substantial change in circumstances; following consent order, which did not specify a reconvening time, wife filed a motion to amend, which was granted, and filed a motion to compel mediation or, in the alternative, for the court to waive child custody mediation, husband filed an answer seeking child custody, wife filed another motion for modification, husband filed a motion to compel wife to submit to psychiat-

ric and psychological examinations, court modified the consent order to grant wife three weeks of physical custody in order for her to take the child on a trip, and subsequently a trial was held on wife's complaint seeking child custody. Miller v. Miller, 2009, 2009 WL 5066907. Child Custody ⇐ 329; Child Custody ⇐ 556

§ 50–13.8. Custody of persons incapable of self-support upon reaching majority

Notes of Decisions

2. Jurisdiction

Under statute indicating that a district court has jurisdiction to enter a custody order in a divorce proceeding involving a disabled adult child, such jurisdiction exists only when the disabled adult child at issue has not been declared incompetent and had a guardian appointed. McKoy v. McKoy, 2010, 2010 WL 537502.

§ 50–16.9. Modification of order

Notes of Decisions

21. Summary judgment

Genuine issue of material fact existed on question of former wife's alleged cohabitation, precluding summary judgment against former husband on his post-divorce motion to terminate alimony on that ground. Bird v. Bird, 2010, 2010 WL 325358. Judgment ⇐ 181(20)

Chapter 50A

Uniform Child–Custody Jurisdiction and Enforcement Act

Article 2

Uniform Child–Custody Jurisdiction and Enforcement Act

Part 3. Enforcement

§ 50A–302. Enforcement under Hague Convention

Notes of Decisions

Construction and application 1

1. Construction and application

Hague Convention petition filed by German Department of Child Services (DCS) seeking return of child to Germany was not verified, and thus trial court lacked subject matter jurisdiction over that petition. Obo v. Steven B., 2009, 2009 WL 5067399.

§ 50A–308. Expedited enforcement of child-custody determination

Notes of Decisions

Jurisdiction 2

2. Jurisdiction

Hague Convention petition filed by German Department of Child Services (DCS) seeking return of child to Germany was not verified, and thus trial court lacked subject matter jurisdiction over that petition. Obo v. Steven B., 2009, 2009 WL 5067399.

Chapter 50B

Domestic Violence

§ 50B–2. Institution of civil action; motion for emergency relief; temporary orders; temporary custody

Notes of Decisions

Sufficiency of evidence 2

½. Ex parte orders

Ex parte domestic violence protection order (DVPO) obtained against father by mother, who alleged that, while she was 29 weeks pregnant, father had put her in headlock and banged her into a wall, was reviewable on appeal, even though the ex parte DVPO was an interlocutory order and would not have been immediately appealable, where a DVPO was later entered, father's notice of appeal was filed after entry of the DVPO, and notice of appeal was given as to both the ex parte DVPO and the DVPO. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 121

An ex parte domestic violence protection order (DVPO) need not contain findings and conclusions that fully satisfy the requirements of the rule of civil procedure governing such findings and conclusions. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 50

Because the purpose of entering an ex parte domestic violence protection order (DVPO) is to protect the aggrieved party, the trial court's decision must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future harm. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 50

Trial court's entry of a domestic violence protection order (DVPO) in favor of mother against father of her child was not dependent upon validity of previously issued ex parte DVPO; the two orders were independent of one another. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 70

1. Review

Where there is competent evidence to support a trial court's findings of fact regarding a domestic violence protection order (DVPO), those findings are binding on appeal. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 131

Ex parte domestic violence protection order (DVPO) against father provided sufficient information to allow review of trial court's decision to issue the order, even though trial court did not separately set forth the specific facts that supported its order; trial court incorporated into the order the allegations of mother's complaint, which alleged in part that father, when mother was 29 weeks pregnant, put her in a headlock and banged her into a wall. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 50

2. Sufficiency of evidence

Facts showed that there was a danger of acts of domestic violence against mother by father so as to support issuance of an ex parte domestic violence protection order (DVPO) against father; two days before mother filed her complaint, defendant had broken and hidden mother's cell phone, heckled mother, put her in a headlock, dragged her, banged her into a wall, and chased her when she got away until she reached a neighbor's house, father and mother had been in a dating relationship and had other pending domestic violence proceedings, and mother believed that she was in serious, immediate danger. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 50

§ 50B–3. Relief

Notes of Decisions

Review 7

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2. Findings

Where there is competent evidence to support a trial court's findings of fact regarding a domestic violence protection order (DVPO), those findings are binding on appeal. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 131

5. Evidence

Trial court's entry of a domestic violence protection order (DVPO) in favor of mother against father of her child was not dependent upon validity of previously issued ex parte DVPO; the two orders were independent of one another. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇦ 70

Personal memory of trial judge who presided over the criminal case in which charges arising from domestic violence were brought against father could not authorize issuance of a domestic

violence protection order (DVPO) against father; evidence in support of the DVPO had to be taken in the DVPO case, not in a separate case that was tried before the same judge. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇐ 62

In proceeding initiated by mother for entry of domestic violence protection order (DVPO) against father of her child, trial court could not take judicial notice of testimony previously presented in father's criminal trial arising from the domestic violence; the facts were disputed quite vigorously in the criminal trial, and trial court could take judicial notice only of facts that were not subject to reasonable dispute. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇐ 59

7. Review

When a trial court sits without a jury regarding a domestic violence protection order (DVPO), the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇐ 131

Ex parte domestic violence protection order (DVPO) obtained against father by mother, who alleged that, while she was 29 weeks pregnant, father had put her in headlock and banged her into a wall, was reviewable on appeal, even though the ex parte DVPO was an interlocutory order and would not have been immediately appealable, where a DVPO was later entered, father's notice of appeal was filed after entry of the DVPO, and notice of appeal was given as to both the ex parte DVPO and the DVPO. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇐ 121

Father's failure to file an answer to the complaint, in proceeding initiated by mother of his child for a domestic violence protection order (DVPO), did not permit trial court to enter a DVPO against father based upon the allegations of the verified complaint without hearing any additional evidence; mother did not file a motion for entry of default judgment against father for his failure to answer, and trial court entered DVPO based only on its personal recollection of the father's criminal trial. Hensey v. Hennessy, 2009, 685 S.E.2d 541. Protection of Endangered Persons ⇐ 57

Chapter 52C

Uniform Interstate Family Support Act

Article 6

Enforcement and Modification of Support Order After Registration

Part 1. Registration and Enforcement of Support Order

§ 52C–6–603. Effect of registration for enforcement

Notes of Decisions

8. Modification—In general

The trial court lacked authority to modify foreign order for child support; the child support order was originally entered in New York and later registered in Florida, mother registered the order in North Carolina for enforcement only, North Carolina did not have personal jurisdiction over mother, who lived in Florida, and the parties did not consent to North Carolina's jurisdiction to modify the child support order. Lacarrubba v. Lacarrubba, 2010, 2010 WL 537462. Child Support ⇐ 507; Child Support ⇐ 509(1)

Part 3. Registration and Modification of Child Support Order

§ 52C–6–611. Modification of child support order of another state

Notes of Decisions

Jurisdiction 4

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4. Jurisdiction

The trial court lacked authority to modify foreign order for child support; the child support order was originally entered in New York and later registered in Florida, mother registered the order in North Carolina for enforcement only, North Carolina did not have personal jurisdiction over mother, who lived in Florida, and the parties did not consent to North Carolina's jurisdiction to modify the child support order. Lacarrubba v. Lacarrubba, 2010, 2010 WL 537462. Child Support ⇐ 507; Child Support ⇐ 509(1)

Chapter 55

North Carolina Business Corporation Act

Article 6

Shares and Distribution

Part 2. Issuance of Shares

§ 55–6–22. Liability of shareholders

Notes of Decisions

1. In general

Sole shareholder of corporation is shielded from liability for acts of corporation, but not from liability for shareholder's own negligent acts or conduct. Van Dyke v. CMI Terex Corp., 2009, 2009 WL 5174099. Corporations ⇐ 215; Corporations ⇐ 223

Chapter 71A

Indians

§ 71A–8. Authorization for federally recognized Indian tribes

Notes of Decisions

Construction with federal law 1

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1. Construction with federal law

State statute authorizing Class III gaming, including video poker, only by Indian tribes and only on tribal land satisfied Indian Gaming Regulatory Act (IGRA) prerequisite that North Carolina be a state that permits such gaming; IRGA permitted states to grant tribes preferential gaming rights, state had explicitly authorized Indian gaming in accordance with IGRA, and statute's voiding clause manifested Legislature's intent that Indian tribe retain its Class III gaming rights under tribal-state compact no matter what the outcome was of a challenge to the statute. McCracken and Amick, Inc. v. Perdue, 2009, 2009 WL 5067298. Indians ⇐ 337(2)

Chapter 75

Monopolies, Trusts and Consumer Protection

Article 1

General Provisions

§ 75–1.1. Methods of competition, acts and practices regulated; legislative policy

Notes of Decisions

4. Construction and application

To establish a prima facie unfair and deceptive trade practice under North Carolina law, a plaintiff must show that: (1) the defendant committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) proximately causing injury to the plaintiff. Hancock v. Renshaw, 2009, 2009 WL 4840231. Antitrust and Trade Regulation ⇐ 134

12.5. Nature and elements of action

Under North Carolina law, conversion in and of itself does not necessarily constitute an unfair or deceptive act or practice; rather, there must be sufficient aggravating or egregious circumstances. Hancock v. Renshaw, 2009, 2009 WL 4840231. Antitrust and Trade Regulation ⇐ 148

To state a claim under North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), plaintiff must show (1) an unfair or deceptive act or practice (2) in or affecting commerce (3) which

proximately caused actual injury to the plaintiff or to his business. Kelly v. Georgia-Pacific LLC, 2009, 2009 WL 4249587. Antitrust and Trade Regulation ⇐ 134

15. Deceptive or unfair acts or practices—In general

Whether an act is unfair or deceptive within the meaning of North Carolina's unfair and deceptive trade practice statute is a question of law and depends on the facts of the particular case. Hancock v. Renshaw, 2009, 2009 WL 4840231. Antitrust and Trade Regulation ⇐ 363

Under North Carolina law, conversion in and of itself does not necessarily constitute an unfair or deceptive act or practice; rather, there must be sufficient aggravating or egregious circumstances. Hancock v. Renshaw, 2009, 2009 WL 4840231. Antitrust and Trade Regulation ⇐ 148

To state a claim under North Carolina Unfair and Deceptive Trade Practices Act (UDTPA), the allegedly unfair or deceptive act or practice must be immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Kelly v. Georgia-Pacific LLC, 2009, 2009 WL 4249587. Antitrust and Trade Regulation ⇐ 135(1); Antitrust and Trade Regulation ⇐ 136

Whether an act or practice is unfair or deceptive under the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA) is a question of law for the court. Kelly v. Georgia-Pacific LLC, 2009, 2009 WL 4249587. Antitrust and Trade Regulation ⇐ 363

17. Reliance on misrepresentations

Where an claim under North Carolina Unfair and Deceptive Trade Practices Act (UDTPA) is based upon an alleged misrepresentation by the defendant, the plaintiff must show actual reliance on the alleged misrepresentation in order to establish that the alleged misrepresentation proximately caused the injury of which plaintiff complains. Kelly v. Georgia-Pacific LLC, 2009, 2009 WL 4249587. Antitrust and Trade Regulation ⇐ 161

To the extent homeowner sought to rely upon allegation of misrepresentation to support North Carolina Unfair and Deceptive Trade Practices Act (UDTPA) against manufacturers of defective product which allegedly damaged home, homeowner failed to allege actual reliance or that misrepresentation proximately caused damage as required to support UDTPA claim. Kelly v. Georgia-Pacific LLC, 2009, 2009 WL 4249587. Antitrust and Trade Regulation ⇐ 203

26.5. Contracts

Regardless of buyer's subjective motives, manufacturer's claim that buyer committed an unfair and/or deceptive trade practice when it allegedly withheld payment on currently due invoices, in an effort to force manufacturer into coming to an agreement with buyer regarding other disputed invoices was not actionable under North Carolina law as an independent Unfair and Deceptive Trade Practice (UDTP) claim separate from its breach of contract claim; manufacturer's allegations stated nothing more than a claim for breach of contract. International Designer Transitions, Inc. v. Faus Group, Inc., 2009, 2009 WL 3247834. Antitrust and Trade Regulation ⇐ 179

53. Sufficiency of claim

Neither manufacturers' failure to address homeowner's warranty claim to his satisfaction nor allegedly defective product design were substantial aggravating circumstances required to support claim against manufacturers of exterior building product under North Carolina Unfair and Deceptive Trade Practices Act (UDTPA) seeking recovery for damage allegedly caused to home by product. Kelly v. Georgia-Pacific LLC, 2009, 2009 WL 4249587. Antitrust and Trade Regulation ⇐ 208; Antitrust and Trade Regulation ⇐ 235

74. Remand

On appeal from bankruptcy court's order in adversary proceeding, awarding debtor damages and attorney fees for creditor's alleged unfair and deceptive trade practices, remand was required for bankruptcy court to determine whether there were sufficient aggravating or egregious circumstances to render creditor's conversion of sewing machine he provided to debtor under layaway contract an unfair and deceptive trade practice under North Carolina law, although bankruptcy court found that creditor acted willfully, where there was no discussion of any egregious or aggravating factor found by bankruptcy court to justify its determination that the conversion was unfair or deceptive. Hancock v. Renshaw, 2009, 2009 WL 4840231. Bankruptcy ⇐ 3790

ARTICLE 3

Motor Fuel Marketing Act

§ 75–90. Availability of gasoline suitable for blending with fuel alcohol; blender of record

Notes of Decisions

Preemption 1
Validity ½

½. Validity

North Carolina Ethanol Blending Statute did not facially discriminate against interstate commerce, and thus did not contravene Dormant Commerce Clause; statute did not impermissibly impose obligation to sell unblended gasoline only upon suppliers that imported gasoline into North Carolina, rather than suppliers that purchased gasoline within state, since there was no evidence as to existence of suppliers who only operated in intrastate commerce. American Petroleum Institute v. Cooper, 2010, 2010 WL 303960. Antitrust and Trade Regulation ⇦ 129; Commerce ⇦ 62.10(2)

1. Preemption

Petroleum trade associations had associational standing under Article III to bring action against State of North Carolina, seeking declaratory and injunctive relief allowing their members to retain ability to sell only ethanol-blended gasoline to distributors and retailers in state; complaint averred realistic danger that associations' members would sustain direct injury as result of operation or enforcement of North Carolina Ethanol Blending Statute. American Petroleum Institute v. Cooper, 2010, 2010 WL 303960. Associations ⇦ 20(1); Declaratory Judgment ⇦ 300

North Carolina Ethanol Blending Statute did not create obstacle to accomplishment and execution of objectives of federal renewable fuel program and methods Congress had chosen to achieve them, and thus was not federally preempted; statute did not obstruct Congress's goal of increasing renewable fuel usage or flexible method Congress chose to give refiners to comply with renewable fuel production mandates. American Petroleum Institute v. Cooper, 2010, 2010 WL 303960. Antitrust and Trade Regulation ⇦ 132; States ⇦ 18.85

North Carolina Ethanol Blending Statute did not impermissibly interfere with petroleum refiners' federal trademark rights, and thus was not federally preempted by Lanham Act; although North Carolina statute did not allow refiners to limit distributors or retailers to predetermined amount of blending, such restrictions went to quantity of blending rather than quality. American Petroleum Institute v. Cooper, 2010, 2010 WL 303960. States ⇦ 18.85; Trademarks ⇦ 1010

North Carolina Ethanol Blending Statute did not impose restrictions on termination and nonrenewal of petroleum franchise agreements beyond those created by federal law, and thus was not federally preempted by Petroleum Marketing Practices Act (PMPA); North Carolina statute's ban on contract provisions restricting franchisees from blending gasoline with fuel alcohol was not contrary to PMPA provision allowing termination for failure to comply with reasonable contract provisions. American Petroleum Institute v. Cooper, 2010, 2010 WL 303960. Antitrust and Trade Regulation ⇦ 132; States ⇦ 18.85

Chapter 84

Attorneys-at-Law

ARTICLE 4

North Carolina State Bar

§ 84–15. Creation of North Carolina State Bar as an agency of the State

Notes of Decisions

1. In general

The "State Bar" is an agency of the state that was created to enable the bar to render more effective service in improving the administration of justice, particularly in dealing with the problem of admission to the bar, and of disciplining and disbarring attorneys at law. Cunningham v. Selman, 2009, 2009 WL 5174292. Attorney and Client ⇦ 31

§ 84–23. Powers of Council

Notes of Decisions

2. In general

State Bar's fee dispute resolution rules were jurisdictional in nature such that attorney seeking payment on disputed legal fees was obligated to comply with those rules as a prerequisite for bringing a civil suit against his former client for the purpose of collecting the fees, and was to participate with the fee resolution program until such time as the efforts made by that program to resolve the dispute came to a natural conclusion. Cunningham v. Selman, 2009, 2009 WL 5174292. Attorney and Client ⇦ 160

The State Bar did not "waive" rules requiring attorney to participate in fee dispute resolution program prior to filing civil suit against client for payment of attorney fees by terminating the fee dispute resolution process and notifying grievance committee of attorney's conduct when it learned that attorney had filed a civil complaint. Cunningham v. Selman, 2009, 2009 WL 5174292. Attorney and Client ⇦ 160

§ 84–28. Discipline and disbarment

Notes of Decisions

3. In general

North Carolina has a dual mechanism for the regulation and discipline of attorneys practicing in the state courts; the State Bar, having established a Code of Professional Responsibility to which its members are required to conform as a condition precedent to the continuing practice of law in North Carolina, is empowered by statute to discipline attorneys and regulate their conduct, and another statute saves and protects the inherent powers of the court to regulate and discipline attorneys practicing before it. Cunningham v. Selman, 2009, 2009 WL 5174292. Attorney and Client ⇦ 32(3); Attorney and Client ⇦ 36(1); Attorney and Client ⇦ 47.1

§ 84–36. Inherent powers of courts unaffected

Notes of Decisions

1. In general

North Carolina has a dual mechanism for the regulation and discipline of attorneys practicing in the state courts; the State Bar, having established a Code of Professional Responsibility to which its members are required to conform as a condition precedent to the continuing practice of law in North Carolina, is empowered by statute to discipline attorneys and regulate their conduct, and another statute saves and protects the inherent powers of the court to regulate and discipline attorneys practicing before it. Cunningham v. Selman, 2009, 2009 WL 5174292. Attorney and Client ⇦ 32(3); Attorney and Client ⇦ 36(1); Attorney and Client ⇦ 47.1

2. Concurrent jurisdiction

With respect to attorney disciplinary or disbarment proceedings, the State Bar and the trial courts of the state share concurrent jurisdiction. Cunningham v. Selman, 2009, 2009 WL 5174292. Attorney and Client ⇦ 36(1); Attorney and Client ⇦ 47.1

Under the system of concurrent jurisdiction over attorney conduct and discipline, both the State Bar and the courts have an important role to play in assuring that attorneys conduct themselves properly, with the courts focusing on protecting themselves from fraud and impropriety and serving the ends of the administration of justice, and the State Bar on the broad range of questions relating to the propriety and ethics of an attorney, and with neither to act in such a manner as to disable or abridge the powers of the other. Cunningham v. Selman, 2009, 2009 WL 5174292. Attorney and Client ⇦ 32(3); Attorney and Client ⇦ 36(1); Attorney and Client ⇦ 47.1

Requiring attorney to comply with the State Bar's fee dispute resolution process as a precondition to initiating civil litigation against client for payment of disputed attorney fees did not interfere with the inherent disciplinary jurisdiction of the courts over attorney conduct, where the matter did not involve any allegations of improper or unethical conduct on the part of attorney prior to his participation in dispute resolution program. Cunningham v. Selman, 2009, 2009 WL 5174292. Attorney and Client ⇦ 160

Chapter 90

Medicine and Allied Occupations

Article 1B

Medical Malpractice Actions

§ 90–21.12. Standard of health care

Notes of Decisions

1. Construction and application

One of the essential elements of a claim for medical negligence is that the defendant breached the applicable standard of medical care owed to the plaintiff. Hawkins v. SSC Hendersonville, 2010, 2010 WL 702731. Health ⇐ 623

24. Presumptions and burden of proof

Plaintiffs in a medical negligence action must establish the relevant standard of care through expert testimony. Hawkins v. SSC Hendersonville, 2010, 2010 WL 702731. Health ⇐ 821(2)

To meet their burden of proving the applicable standard of care in a medical negligence action, plaintiffs must satisfy statutory requirement of showing that the care "was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." Hawkins v. SSC Hendersonville, 2010, 2010 WL 702731. Health ⇐ 620

37. —— Same or similar community standard, expert witnesses

Expert witnesses who testified to the standard of care applicable to nursing home failed to demonstrate any level of familiarity with the local community or a similar community as required in estate administrator's medical negligence action; expert witness in the fields of internal medicine and geriatric medicine testified to the existence of a standard that applies to all licensed nursing homes in the country, expert witness in the field of nursing testified she conducted no analysis of resources available in the local community or of the standard of care practiced in communities with similar resources and was not acquainted in any way with the nursing home community in the local area, and expert witness in the field of nursing home administration only testified that national standards would apply to nursing home. Hawkins v. SSC Hendersonville, 2010, 2010 WL 702731. Evidence ⇐ 538

Article 2

Dentistry

§ 90–41.1. Hearings

Notes of Decisions

Construction and application 1

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1. Construction and application

Trial court's orders that granted Board of Dental Examiners' motion to enforce subpoenas for patient records in Board's disciplinary investigation of dentist and that granted Board's motion to quash dentist's notices of deposition and subpoenas were interlocutory orders and thus were immediately appealable only if orders affected a substantial right; orders did not dispose of the case, but instead left it for further action by trial court in order to settle and determine entire controversy. North Carolina State Bd. of Dental Examiners v. Woods, 2010, 2010 WL 313556. Health ⇐ 223(1)

Trial court's order quashing dentist's notices of deposition and subpoenas she served upon Board of Dental Examiners, its president, and its secretary–treasurer regarding investigation of dentist did not affect a substantial right and thus was not immediately appealable; because no disciplinary proceeding had been filed against dentist, she was not entitled to engage in discovery. North Carolina State Bd. of Dental Examiners v. Woods, 2010, 2010 WL 313556. Health ⇐ 223(1)

Statute governing discovery during disciplinary proceedings before Board of Dental Examiners does not permit a dentist to engage in discovery until the Board files a notice of hearing. North Carolina State Bd. of Dental Examiners v. Woods, 2010, 2010 WL 313556. Health ⇐ 217

ARTICLE 5

North Carolina Controlled Substances Act

§ 90–87. Definitions

Notes of Decisions

3. Deliver or delivery

Defendant "delivered" methadone and hydrocodone tablets to undercover police officer, within meaning of statute that prohibited trafficking in opium derivative by delivery, when she took drugs out of her purse to give to officer and told officer to put money on dashboard of her vehicle. State v. Beam, 2010, 2010 WL 59291.

§ 90–95. Violations; penalties

Notes of Decisions

II. NATURE AND ELEMENTS OF OFFENSES

35. Possession—In general

The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance, (2) the substance must be a controlled substance, and (3) there must be intent to sell or distribute the controlled substance. State v. Richardson, 2010, 2010 WL 537459.

Issue whether defendant was authorized to possess hydrocodone tablets pursuant to prescription was question for jury, in trial for possession, transportation or delivery of opium derivative. State v. Beam, 2010, 2010 WL 59291.

One may be exempt from prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so possess or sell or deliver such substances. State v. Beam, 2010, 2010 WL 59291.

V. EVIDENCE

184. —— Possession, presumptions and burden of proof, evidence

To send a charge of possession of a controlled substance to the jury, the State must offer sufficient evidence that (1) the substance was controlled and (2) defendant knowingly possessed the substance. State v. Barron, 2010, 2010 WL 702573. Controlled Substances ⇨ 26; Controlled Substances ⇨ 27

In a prosecution under the Controlled Substances Act, it is the defendant's burden to establish that an exemption from its provisions is applicable. State v. Beam, 2010, 2010 WL 59291.

195. —— Lab reports and test results, admissibility of evidence

Defendant who failed to object to admissibility of lab report before or at trial waived his Sixth Amendment right to confront the lab analyst. State v. Steele, 2010, 2010 WL 59653.

224. —— Constructive possession, sufficiency of evidence

Other incriminating circumstances were insufficient to show that defendant had constructive possession over crack cocaine found nearby his person in house in which defendant was found with other individuals, where defendant was not listed as a renter at the house, none of the utilities were in his name, no documents with defendant's name on them were located there, none of defendant's family members lived there, and there was no evidence that he slept there or otherwise lived there. State v. Richardson, 2010, 2010 WL 537459.

Evidence was sufficient to support finding defendant had constructive possession of two packages of cocaine; there was evidence defendant fled into the woods when approached by police officers, that police officers found both the first and second packages of cocaine a few feet from where defendant was apprehended in the woods, that defendant admitted that the cocaine found was his, told the detective that there were two cocaine packages to be found after first package was discovered, and explained from whom he bought the cocaine, where he bought it, how much he paid for it, and in what form he bought it, and that one of defendant's residences was also only approximately 200–300 feet from where police officers found the two cocaine packages. State v. Steele, 2010, 2010 WL 59653.

226. —— Control of premises, sufficiency of evidence

State's evidence, which showed nothing more than defendant had been in an area where he could have committed the crimes charged, was insufficient to send the charge of possession of controlled substances to the jury; there was no evidence that defendant had exclusive possession of place where narcotics were found, only potential incriminating circumstance beyond defendant's presence in room was fact that defendant's actions and demeanor were suspect, and defendant's "actions and demeanor" resulted solely from officer's inquiry into ownership of vehicle in driveway and, thus, were insufficient evidence of defendant's intent and capability to maintain control and dominion over controlled substances discovered in residence. State v. Barron, 2010, 2010 WL 702573. Controlled Substances ⇨ 93

VII. SENTENCING AND PUNISHMENT

321. Reduction for substantial assistance, sentencing and punishment—In general

Controlled substances sentencing statute allowing a sentencing reduction to less than the applica-

ble minimum if a defendant renders substantial assistance is a provision exchanging potential leniency for assistance; it is the only provision in the trafficking statutory scheme which gives a sentencing judge the discretion not to impose the statutorily mandated minimum sentence and fine. State v. Steele, 2010, 2010 WL 59653.

324. —— Review, reduction for substantial assistance, sentencing and punishment

Defendant did not offer substantial assistance as required for mitigation of his sentence for trafficking in cocaine by possession; while defendant met with federal authorities to look at pictures and discuss certain individuals in which they were interested, defendant consistently rejected prosecutor's offer to drip habitual felon charge if defendant would assist federal authorities in controlled buys on the street and plead guilty to trafficking charge, and information which defendant did provide by looking at pictures did not result in a prosecution or in testimony against any other defendant. State v. Steele, 2010, 2010 WL 59653.

§ 90–108. Prohibited acts; penalties

Notes of Decisions

Construction with federal law 2.5

2.5. Construction with federal law

Defendant's prior North Carolina conviction for maintaining a vehicle for the keeping or selling of drugs was a felony drug offense for purposes of sentencing him under Comprehensive Drug Abuse Prevention and Control Act since defendant's North Carolina conviction was punishable by more than one year under recidivist provision of the statute. U.S. v. Watson, 2009, 336 Fed.Appx. 363, 2009 WL 1931226, Unreported. Sentencing and Punishment ⇦ 793

Article 5B

Drug Paraphernalia

§ 90–113.22. Possession of drug paraphernalia

Notes of Decisions

8. Sufficiency of evidence

Evidence was insufficient to establish that defendant had constructive possession of drug paraphernalia, including glassine pipe, digital scales, and plastic sandwich bags, recovered from house where defendant was found; while defendant was first identified in backyard and it could be inferred that he ran through kitchen to backyard, pipe was found in a lower cabinet in the kitchen and was not otherwise connected to defendant, and nothing connected defendant to room where scales and bags were found. State v. Richardson, 2010, 2010 WL 537459.

Chapter 95

Department of Labor and Labor Regulations

Article 2A

Wage and Hour Act

§ 95–25.6. Wage payment

Notes of Decisions

Discretion of court 10

10. Discretion of court

District court did not abuse its discretion in ruling on all of issues raised by employer's summary judgment motion on discharged employee's claims alleging wrongful retaliatory discharge under North Carolina law, common law fraud, wrongful discharge due to age and disability discrimination in violation of state and federal law, and violation of North Carolina's Wage and Hour Act following dismissal of federal claims; federal issues before district court were closely connected to state claims, and district court had long and close familiarity with facts. Hardin v. Belmont Textile Machinery Co., 2009, 2009 WL 4609773, Unreported. Federal Courts ⇦ 18

§ 95–25.22. Recovery of unpaid wages

Notes of Decisions

3. Accrual of cause of action

Discharged employee's cause of action against his former employer under North Carolina's Wage and Hour Act accrued, and two-year limitations period began to run, upon employee's termination from company. Hardin v. Belmont Textile Machinery Co., 2009, 2009 WL 4609773, Unreported. Limitation of Actions ⇦ 58(1)

Article 16

Occupational Safety and Health Act of North Carolina

§ 95–129. Rights and duties of employers

Notes of Decisions

2. Duties, generally

Employer owes a non-delegable duty to provide employee with a safe workplace. Edwards v. GE Lighting Systems, Inc., 2009, 685 S.E.2d 146. Labor and Employment ⇦ 2577; Labor and Employment ⇦ 2848

10. Review

Parent company of employer was not employee's employer and therefore parent company did not owe him a statutory duty to provide him with a safe workplace. Edwards v. GE Lighting Systems, Inc., 2009, 685 S.E.2d 146. Labor and Employment ⇦ 2563

§ 95–131. Development and promulgation of standards; adoption of federal standards and regulations

Notes of Decisions

2. Specific standards

Alleged failure of general contractor on residential construction project to comply with Occupational Safety and Health Administration (OSHA) regulations did not establish that general contractor failed to exercise proper care in performance of duty owed to employee of framing subcontractor, who was injured when he fell from landing onto concrete floor approximately ten feet below, and thus general contractor was not liable for employee's injuries; landing was not constructed or furnished by general contractor for purpose of giving employee access to roof, but was balcony located in interior of residential structure, built by one subcontractor for purpose of overlooking interior living area, and employee was not required to perform his job duties on landing. Pike v. D.A. Fiore Const. Services, Inc., 2009, 2009 WL 5174376. Negligence ⇦ 1205(7)

Chapter 97

Workers' Compensation Act

Article 1

Workers' Compensation Act

§ 97–2. Definitions

Notes of Decisions

IV. COMPENSATION

312. Medical treatment, compensation

Competent evidence supported the Industrial Commission's finding that workers' compensation claimant was entitled to attendant care services; subsequent to her surgery, claimant continued to experience significant pain as the result of her admittedly compensable injury by accident and had been prescribed pain medications, and as a result of her injury by accident, claimant had difficulty maneuvering around her home and frequently fell, and claimant was unable to get in and out of her bathtub by herself, dress herself, prepare her own meals, clean, perform yard work, retrieve her mail, or drive for errands or medical

appointments. Boylan v. Verizon Wireless, 2009, 685 S.E.2d 155. Workers' Compensation ⇐ 998

V. AVERAGE WEEKLY WAGES

342. —— Method of computation, computation of average weekly wages

Industrial Commission could calculate workers' compensation claimant's average weekly wage by resorting to method that most nearly approximated the amount which he would be earning were it not for the injury rather than by dividing the wages earned during claimant's stunt man contract with employer by the number of weeks worked, as the latter method would have been unfair to employer in light of the nature of claimant's stunt work, which meant that he had short periods of very high earnings interspersed with periods when he did not work at all. Barrett v. All Payment Services, Inc., 2009, 2009 WL 5067444. Workers' Compensation ⇐ 814

343.5. —— Earnings defined, computation of average weekly wages

Industrial Commission could not consider income earned from other employers when calculating workers' compensation claimant's average weekly wage under statutory method providing that "where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury;" while claimant was employed as stunt man under six-week contract with employer when he suffered back injury, Commission approximated employee's average weekly wage by dividing his earnings from all his stunt work over the preceding year by 52 weeks. Barrett v. All Payment Services, Inc., 2009, 2009 WL 5067444. Workers' Compensation ⇐ 828

When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury. Barrett v. All Payment Services, Inc., 2009, 2009 WL 5067444. Workers' Compensation ⇐ 828

An employee who unfortunately breaks his leg while working at a weekly Saturday-only job has his compensation calculated upon his average weekly wage from that job, not his regular forty-hour-a-week employment. Barrett v. All Payment Services, Inc., 2009, 2009 WL 5067444. Workers' Compensation ⇐ 828

§ 97–9. Employer to secure payment of compensation

Notes of Decisions

28.5. —— Parent and subsidiary corporations, persons liable as third persons

Parent company of employer was not entitled to per se immunity under Workers' Compensation Act from wrongful death action brought by administratrix of deceased employee's estate. Edwards v. GE Lighting Systems, Inc., 2009, 685 S.E.2d 146. Workers' Compensation ⇐ 2161

§ 97–10.1. Other rights and remedies against employer excluded

Notes of Decisions

5. Employers within act

Parent company of employer was not entitled to per se immunity under Workers' Compensation Act from wrongful death action brought by administratrix of deceased employee's estate. Edwards v. GE Lighting Systems, Inc., 2009, 685 S.E.2d 146. Workers' Compensation ⇐ 2161

§ 97–10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties

Notes of Decisions

39. —— Lien of employer or insurer, right to proceeds of action or settlement

A lien against third-party settlement proceeds received by a workers' compensation claimant is a lien against all amounts paid or to be paid to the claimant and is mandatory in nature. Jones v. Steve Jones Auto Group, 2009, 684 S.E.2d 497. Workers' Compensation ⇐ 2252

§ 97–18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties

Notes of Decisions

3. Admission of employee's right to compensation

Employer and its workers' compensation insurance carrier did not accept compensability of death benefits claim brought by employee's widow by filing form requesting hearing; even if Industrial Commission's rule meant that form signaled acceptance of widow's claim, Workers' Compensation Act required defendants to file form specifically accepting claim on form mandated by Commission. Heflin v. G.R. Hammonds Roofing, Inc., 2009, 2009 WL 5174084. Workers' Compensation ⇐ 1114

§ 97–22. Notice of accident to employer

Notes of Decisions

6. Reasonable excuse—In general

When the employee does not give employer timely written notice of alleged work-related injury, regardless of whether the employer had actual notice of the accident, the Industrial Commission cannot award compensation unless it (1) concludes as a matter of law that the lack of timely written notice was reasonably excused and that the employer was not prejudiced and (2) supports those conclusions with appropriate findings of fact. Gregory v. W.A. Brown & Sons, 2010, 2010 WL 325375. Workers' Compensation ⇐ 1232; Workers' Compensation ⇐ 1252

21. Findings of fact

Full Industrial Commission was required to make specific findings on crucial facts upon which right to workers' compensation benefits depended, specifically whether claimant had reasonable excuse for not providing written notice of injury to employer within 30 days of injury and whether employer was prejudiced by claimant's delay in providing written notice of injury. Gregory v. W.A. Brown & Sons, 2010, 2010 WL 325375. Workers' Compensation ⇐ 1820

§ 97–25. Medical treatment and supplies

Notes of Decisions

19. —— Hearing, findings, and original and supplemental awards, proceedings for recovery of medical expenses

There was insufficient evidence to establish that the development of a life care plan was necessary, and thus, Industrial Commission did not abuse its discretion by failing to find that workers' compensation claimant needed life care planning as a necessary medical treatment. Boylan v. Verizon Wireless, 2009, 685 S.E.2d 155. Workers' Compensation ⇐ 998

§ 97–30. Partial incapacity

Notes of Decisions

8. Calculation of compensation

Industrial Commission was required to make findings about workers compensation claimant's wages or earnings in the years following his injury in order to award temporary partial disability benefits for claimant's back injury. Barrett v. All Payment Services, Inc., 2009, 2009 WL 5067444. Workers' Compensation ⇐ 1756

§ 97–53. Occupational diseases enumerated; when due to exposure to chemicals

Notes of Decisions

20. —— Construction of provisions, compensability as occupational disease

Three elements must be satisfied to prove that a disease not statutorily listed is an occupational disease for purposes of workers' compensation: (1) the disease must be characteristic of and peculiar to the claimant's particular trade, occupation, or employment, (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment, and (3) there must be proof of a causal connection between the disease and the employment; the first two elements are satisfied where the employee can show that the employment exposed the worker to a greater risk of contracting the disease than the public generally, and the third element is satisfied if the employment significantly contributed to, or was a significant causal factor in, the disease's development. Jones v. Steve Jones Auto Group,

2009, 684 S.E.2d 497. Workers' Compensation ⇐ 548

43. —— Lung disease, sufficiency of evidence

Evidence supported a finding that claimant's work placed him at an increased risk for contracting pulmonary airway disease as compared to the public generally, so as to support an award of workers' compensation benefits for disability due to mold exposure at claimant's place of employment, which was an automobile dealership; industrial hygienist testified that the general public was not exposed to stachybotrys, also known as black mold, at any level, results of mold testing revealed a large quantity of stachybotrys in samples taken from claimant's office with no stachybotrys outside, and, inter alia, a physician testified that claimant's exposure to stachybotrys and other molds present in his office placed him at an increased risk, greater than that of members of the general public, of developing the inflammation in his lungs. Jones v. Steve Jones Auto Group, 2009, 684 S.E.2d 497. Workers' Compensation ⇐ 1530

Evidence supported a finding that claimant's exposure to mold at his place of employment, which was an automobile dealership, caused his pulmonary airway disease, so as to support an award of workers' compensation benefits for disability due to mold exposure, even though employer argued that medical experts erroneously based their opinions on the temporal relationship between the discovery of mold in claimant's office and the onset of claimant's symptoms; physician opined that claimant's symptoms and problems were significantly aggravated if not caused completely by his exposure to mold in the workplace, and a clinical professor of medicine opined that claimant's persistent asthma and related symptoms were caused by his exposure to mold at work. Jones v. Steve Jones Auto Group, 2009, 684 S.E.2d 497. Workers' Compensation ⇐ 1530

§ 97–86. Award conclusive as to facts; appeal; certified questions of law

Notes of Decisions

1. In general

An appeal of right arises only from a final order or decision of the Industrial Commission. Berardi v. Craven County Schools, 2010, 2010 WL 356200. Workers' Compensation ⇐ 1834

5. —— Interlocutory orders, right of review

A decision of the Industrial Commission that determines one but not all of the issues in a case is interlocutory, as is a decision which on its face contemplates further proceedings or does not fully dispose of the pending stage of the litigation; however, immediate review of an interlocutory decision is proper where it affects a substantial right. Berardi v. Craven County Schools, 2010, 2010 WL 356200. Workers' Compensation ⇐ 1834

Industrial Commission ruling on workers' compensation claimant's pain management treatment request under the Medical Motions Procedure was not a final ruling that determined all issues in the case, and thus ruling was interlocutory and not subject to appeal; employer and insurer sought a ruling that claimant's medical conditions were not caused by a compensable injury, which was an issue on which the Industrial Commission had yet to rule. Berardi v. Craven County Schools, 2010, 2010 WL 356200. Workers' Compensation ⇐ 1834

§ 97–90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation

Notes of Decisions

2. Attorney's fees—In general

Because statute required appeal of attorney fee issue to the senior resident superior court judge of the district of the county in which the cause arose, Court of Appeals was without jurisdiction to hear attorney fee issue, given that the attorney fee award set by the deputy commissioner was not a ground on which the appeal to the Full Industrial Commission was based, but the Commission did reduce the attorney fee award, and workers' compensation claimant appealed directly to the Court of Appeals. Boylan v. Verizon Wireless, 2009, 685 S.E.2d 155. Workers' Compensation ⇐ 1981

14. Sufficiency of evidence

Competent evidence supported the Industrial Commission's finding that workers' compensation claimant was entitled to attendant care services; subsequent to her surgery, claimant continued to experience significant pain as the result of her admittedly compensable injury by accident and had been prescribed pain medications, and as a result of her injury by accident, claimant had difficulty maneuvering around her home and frequently fell, and claimant was unable to get in and out of her bathtub by herself, dress herself, prepare her own meals, clean, perform yard work, retrieve her mail, or drive for errands or medical appointments. Boylan v. Verizon Wireless, 2009, 685 S.E.2d 155. Workers' Compensation ⇐ 998

Industrial Commission's findings of fact sufficiently established the number of hours of attendant care workers' compensation claimant required in the past and reasonably would require in the future; based upon eight hours of care per day,

seven days a week, claimant's daughter provided claimant 56 hours of care per week, and other attendants provided 32 hours of care per week, based upon four hours of care during the weekdays and six hours per day on weekends. Boylan v. Verizon Wireless, 2009, 685 S.E.2d 155. Workers' Compensation ⇐ 970

15. Review

Industrial Commission did not err by ordering employer to pay benefits retroactively for attendant care services provided to workers' compensation claimant by her family members. Boylan v. Verizon Wireless, 2009, 685 S.E.2d 155. Workers' Compensation ⇐ 983

Chapter 99B

Products Liability

§ 99B–2. Seller's opportunity to inspect; privity requirements for warranty claims

Notes of Decisions

3. Duty to inspect

Under North Carolina law, distributor of allegedly defective U-bolt installed in manhole cover did not have duty to inspect U-bolt for cracks or embrittlement prior to distribution of U-bolt to manhole cover supplier, who subsequently sold manhole cover to plaintiff's employer, and thus, distributor was not liable for plaintiff's injuries when U-bolt sheared off and broke away from cover while plaintiff was attempting to remove cover; there was evidence that crack was not visible to naked eye and therefore, defect was latent, and distributor did not undertake duty to inspect U-bolts. McLaurin v. East Jordan Iron Works, Inc., 2009, 2009 WL 3461861. Products Liability ⇐ 145; Products Liability ⇐ 282

4. Privity

Under North Carolina law, injured plaintiff could not maintain claim against manufacturer of U-bolt for breach of implied warranty with respect to U-bolt installed on manhole cover that broke off while plaintiff was attempting to remove manhole cover, unless plaintiff could demonstrate privity with manufacturer by showing that plaintiff's employer purchased manhole cover. McLaurin v. East Jordan Iron Works, Inc., 2009, 2009 WL 3461861. Sales ⇐ 255

Chapter 105

Taxation

SUBCHAPTER I. LEVY OF TAXES

Article 3

Franchise Tax

§ 105–129. Extension of time for filing returns

Notes of Decisions

Construction and application 1

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1. Construction and application

Mere fact that taxpayer engaged in manufacturing during subject tax year, without more, did not render it eligible to receive Lee Act credits for that tax year, as eligibility depended upon whether manufacturing was taxpayer's primary activity or primary business in each year in question; language in statute defined manufacturing by North American Industrial Classification System (NAICS) Code, and Code's guidelines provided that an establishment was classified to an industry when its primary activity met definition for that industry. North Carolina Dept. of Revenue v. Bill Davis Racing, 2009, 684 S.E.2d 914. Taxation ⇐ 2540

ARTICLE 3A

Tax Incentives for New and Expanding Businesses [Repealed]

§ 105–129.2. Definitions

Notes of Decisions

Construction and application 1
Manufacturing 2

1. Construction and application

Mere fact that taxpayer engaged in manufacturing during subject tax year, without more, did not render it eligible to receive Lee Act credits for that tax year, as eligibility depended upon whether manufacturing was taxpayer's primary activity or primary business in each year in question; language in statute defined manufacturing by North American Industrial Classification System (NAICS) Code, and Code's guidelines provided that an establishment was classified to an industry when its primary activity met definition for that industry. North Carolina Dept. of Revenue v. Bill Davis Racing, 2009, 684 S.E.2d 914. Taxation ⇦ 2540

2. Manufacturing

Identification of whether primary business or activity in which taxpayer is engaged is manufacturing, so as to be eligible for Lee Act tax credits, requires three-step analysis: (1) relative percentage of production costs and capital investment utilized in taxpayer's manufacturing business compared to same figures for its overall business should be determined; (2) extent to which taxpayer's production costs and capital investment are manufacturing-related; and (3) all other relevant factors to identify taxpayer's principal product or group of products, if relative percentage of production costs and capital investment does not provide adequate basis for properly identifying taxpayer's primary business or activity. North Carolina Dept. of Revenue v. Bill Davis Racing, 2009, 684 S.E.2d 914. Taxation ⇦ 2540

On judicial review of Tax Review Board's determination that taxpayer was entitled to receive Lee Act tax credits during relevant tax years if its primary business or activity was manufacturing, trial court was required to consider taxpayer's relative percentage of production costs and capital investment devoted to manufacturing. North Carolina Dept. of Revenue v. Bill Davis Racing, 2009, 684 S.E.2d 914. Taxation ⇦ 2540

Record evidence failed to conclusively establish that manufacturing was taxpayer's primary business or primary activity during relevant tax period, as required to be eligible to receive tax credits under Lee Act; while record contained evidence tending to show relative percentage of taxpayer's production costs and capital investment devoted to manufacturing compared to taxpayer's overall production costs and capital investment, those figures were not embodied in any finding of fact, and were not conclusive of, but, rather were merely highly relevant to, taxpayer's eligibility under Act. North Carolina Dept. of Revenue v. Bill Davis Racing, 2009, 684 S.E.2d 914. Taxation ⇦ 2725

ARTICLE 5

Sales and Use Tax

Part 1. Title, Purpose and Definitions

§ 105–164.3. Definitions

Notes of Decisions

Standing 1.6

1.6. Standing

Mere fact that taxpayers paid North Carolina income and sales and use taxes, without more, did not give them standing to challenge a sales and use tax exemption afforded to eligible internet data centers; membership in the class adversely affected by the allegedly discriminatory tax statute was a precondition for mounting a challenge to its constitutionality. Munger v. State, 2010, 2010 WL 537641. Constitutional Law ⇦ 726

Taxpayers had to demonstrate that they belonged to the class which was prejudiced by a sales and use tax exemption afforded to eligible internet data centers as a prerequisite for maintaining a constitutional challenge; there was no distinction between challenges to the existence of an exemption and challenges to the qualifying criteria associated with an exemption. Munger v. State, 2010, 2010 WL 537641. Constitutional Law ⇦ 718

Taxpayers did not belong to the class prejudiced by sales and use tax exemption afforded to eligible internet data centers, and thus lacked standing to launch constitutional challenge; class at issue was all sales and use taxpayers, and argument that they paid the taxes from which the eligible internet data centers were exempt from was not, without more, enough to demonstrate prejudice. Munger

v. State, 2010, 2010 WL 537641. Constitutional Law ⇨ 718

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY

ARTICLE 13

Standards for Appraisal and Assessment

§ 105–283. Uniform appraisal standards

Notes of Decisions

2. Validity of valuation method

Tax Commission's decision affirming county tax appraiser's valuation of taxpayer's business personal property, specifically computer equipment, was arbitrary and capricious, requiring reversal, even though the valuation was based on schedule of depreciation supplied by the Commission; after taxpayer presented a reasoned alternative valuation method to the method used by county, the Commission failed to indicate the best valuation approach, did not indicate why taxpayer's approach was not the best approach, did not determine the market value of the property, did not explain the valuation premises behind the schedule, and did not address the useful life of the property or why the circumstances did not warrant adjustments for additional functional or economic obsolescence. In re IBM Credit Corp., 2009, 2009 WL 5174285. Taxation ⇨ 2678; Taxation ⇨ 2699(11)

Tax Commission's finding on taxpayer's challenge to county tax appraiser's valuation of business personal property, specifically computers, that a schedule of depreciation issued by the Commission, on which county relied, produced a "true value" of the property, was unsupported by the record, requiring reversal of Commission's decision to uphold county's valuation; the schedule mirrored accounting depreciation methods but not valuation depreciation methods pertinent to computer equipment, as the schedule did not provide for functional or economic obsolescence. In re IBM Credit Corp., 2009, 2009 WL 5174285. Taxation ⇨ 2699(11); Taxation ⇨ 2728

21. Presumptions and burden of proof

Expert opinions from computer equipment appraisers regarding true value of taxpayer's business computer equipment, which opinions also addressed the unreliability of Tax Commission's schedule of depreciation of computers for purposes of assessing value for ad valorem taxation, was evidence tending to show that the county tax appraiser used an arbitrary method of valuation in taxing the computer equipment as business personal property, and therefore, taxpayer shifted burden of persuasion back to county to show that its method produced a true value. In re IBM Credit Corp., 2009, 2009 WL 5174285. Taxation ⇨ 2723

ARTICLE 17

Administration of Listing

§ 105–304. Place for listing tangible personal property

Notes of Decisions

7. —— Review, tax situs

Taxpayer, a foreign corporation, had business situs in the state, for personal property tax purposes, as taxpayer identified its principal office as its address in the state, established maintenance and storage facilities there, and regularly hired employees to work there, such that taxpayer more or less established a permanent business in the state. In re Amusements of Rochester, Inc., 2009, 2009 WL 5174096. Taxation ⇨ 2255

Tax situs of amusement equipment of taxpayer, a foreign corporation, was in the state, such that equipment was subject to ad valorem taxes, as taxpayer was domiciled in state, it had established business situs there, equipment was maintained and stored at its address in the state at same address taxpayer listed as its principal place of business on its certificate of authority to operate in the state, and even though equipment was in state for only six months of the year, taxpayer did not establish that it paid ad valorem taxes on equipment in another state. In re Amusements of Rochester, Inc., 2009, 2009 WL 5174096. Taxation ⇨ 2257

24. —— Review, foreign corporations

Taxpayer, a foreign corporation, was domiciled in the state, for purposes of personal property taxes, as taxpayer had been granted a certificate of authority to operate in the state, on which taxpayer listed its address in the state as its principal place of business. In re Amusements of Roch-

ester, Inc., 2009, 2009 WL 5174096. Taxation ⇨ 2255

Chapter 108A

Social Services

Article 2

Programs of Public Assistance

Part 1. In General

§ 108A–25. Creation of programs

Notes of Decisions

Due process ¾

¾. **Due process**

In action brought by former provider of HIV case management services, challenging its decertification by the North Carolina Department of Health and Human Services (DHHS), Superior Court's adjudicatory decision upholding provider's decertification was rationally related to North Carolina statute providing that goal of providing a program of public assistance, and thus did not violate provider's right to substantive due process. Bradley-Reid Corp. v. North Carolina Dept. of Health and Human Services, Div. of Public Health, 2009, 2009 WL 5174287.

Part 6. Medical Assistance Program

§ 108A–55. Payments

Notes of Decisions

8. Review

Purchase agreement by which wife of hospitalized husband sold 100% of her stock in family business to her son, prior to applying for Medicaid benefits to cover husband's hospitalization, was not a "chattel" or "chattel paper" so as to be a liquid asset as defined by the North Carolina Adult Medicaid Manual, and thus, was not countable resource toward husband's assets for Medicaid eligibility purposes; the purchase agreement was not transferable or moveable, and the payment terms of the agreement were too uncertain to determine what value should be given and when payments of such value should begin. Estate of Wilson v. Division of Social Services, 2009, 685 S.E.2d 135. Health ⇨ 471(5)

Chapter 135

Retirement System for Teachers and State Employees; Social Security; Health Insurance Program for Children

Article
3A. Other Benefits for Teachers, State Employees, Retired State Employees, and Child Health.

Article 3A

Other Benefits for Teachers, State Employees, Retired State Employees, and Child Health.

Part 2A. Administrative Structure

Section
135–38.7. Recodified.

Part 2A. Administrative Structure

§ 135–38.7. Recodified as § 135–44.4 by the Revisor of Statutes.

Part 5A. Health Insurance Program for Children

Historical and Statutory Notes

Redesignated as Part 5 under Article 3A by the Revisor of Statutes.

Part 5. Health Insurance Program for Children

Cross References

Allocation of federal and state funds for program; consultation with joint legislative health care oversight committee, see § 108A–70.22.

Claims processing; payments, see § 108A–70.24.

Services for children with special needs established; definition; eligibility; services; limitation; recommendations; no entitlement, see § 108A–70.23.

Chapter 136

Transportation

ARTICLE 2

Powers and Duties of Department and Board of Transportation

§ 136–18. Powers of Department of Transportation

Notes of Decisions

Summary judgment 27

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4. Scope of responsibilities

Town did not breach any duty to install appropriate traffic signaling devices at intersection where accident occurred, where driver on road under town control was able to see stop sign, stopped at stop sign, and looked both ways before driving into intersection where she collided with truck driving on state highway under control of the state Department of Transportation. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇦ 279

Town did not have control of state highway which allegedly had insufficient site distance for motorists entering intersection of state highway and town street and thus did not breach any duty to car driver to maintain proper site distance for motorists entering intersection; driver, who was on town road, stopped at corner and did not have a limited site distance on town road or any difficulty recognizing the stop sign at the intersection. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇦ 255

There was no evidence to support driver's contention that town negligently failed to trim and/or maintain trees and shrubbery on property at corner of intersection of town street and state highway where traffic accident occurred; there was no evidence that view on town street was obstructed, and responsibility for any shrubbery that obstructed view down state highway was with the state Department of Transportation. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇦ 269

Town was not negligent for failing to reduce the speed limit at intersection of town street and state highway where accident occurred; speed limit on town street was not at issue, as driver came to a stop when she reached the intersection, while speed limit on state highway was not within town's authority. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇦ 277.1

27. Summary judgment

Testimony of expert witness that town had certain duties as regards the safety of town street did not create a genuine issue of material fact for summary judgment purposes as to town's liability for accident at intersection of street and state highway; question of town's legal liability was a question of law for the court, and expert was not tendered as an expert in the law, statutory interpretation, or other relevant area. Blackwell v. Hatley, 2010, 2010 WL 348187. Judgment ⇦ 185.3(21)

ARTICLE3A

Transportation Systems in and around Municipalities

§ 136–66.1. Responsibility for streets inside municipalities

Notes of Decisions

4. Liability of local authority

Town did not breach any duty to install appropriate traffic signaling devices at intersection where accident occurred, where driver on road under town control was able to see stop sign, stopped at stop sign, and looked both ways before driving into intersection where she collided with truck driving on state highway under control of the state Department of Transportation. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇦ 279

Town did not have control of state highway which allegedly had insufficient site distance for motorists entering intersection of state highway and town street and thus did not breach any duty to car driver to maintain proper site distance for motorists entering intersection; driver, who was on town road, stopped at corner and did not have a limited site distance on town road or any difficulty recognizing the stop sign at the intersection. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇦ 255

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Testimony of expert witness that town had certain duties as regards the safety of town street did not create a genuine issue of material fact for summary judgment purposes as to town's liability for accident at intersection of street and state highway; question of town's legal liability was a question of law for the court, and expert was not tendered as an expert in the law, statutory interpretation, or other relevant area. Blackwell v. Hatley, 2010, 2010 WL 348187. Judgment ⇦ 185.3(21)

ARTICLE 9

Condemnation

§ 136–112. Measure of damages

Notes of Decisions

3. Fair market value—In general

For purposes of determining just compensation in a condemnation case, in arriving at the fair market value immediately prior to the taking, the determinative question is what was the value of the land, in its condition on the day of taking, for the highest and best use to which it would be put by owners possessed of prudence, wisdom and adequate means. Progress Energy Carolinas, Inc. v. Strickland, 2009, 685 S.E.2d 521. Eminent Domain ⇦ 134

Chapter 143

State Departments, Institutions, and Commissions

Article 21

Water and Air Resources

Part 1. Organization and Powers Generally; Control of Pollution

§ 143–215.6A. Enforcement procedures: civil penalties

Notes of Decisions

Final agency decision 5

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5. Final agency decision

Date on which landowner's options to challenge Department of Environment and Natural Resources (DENR) penalty expired, rather than earlier date on which landowner received DENR letter outlining his options for responding to the penalty, was date of "final agency decision" which began the running of the statute of limitations on state's ability to collect the penalty; letter stated the a penalty, outlined landowner's options for appealing the penalty, and gave a clear date on which the penalty would no longer be appealable, which was the date that initiated the running of the statute of limitations. State, ex rel. Ross v. Overcash, 2010, 2010 WL 537635. Environmental Law ⇦ 671

Article 31

Tort Claims against State Departments and Agencies

§ 143–291. Industrial Commission constituted a court to hear and determine claims; damages; liability insurance in lieu of obligation under Article

Notes of Decisions

14. Negligence

The Department of Transportation (DOT) is subject to a suit to recover damages caused by its negligence only as is provided in the Tort Claims Act. Phillips ex rel. Bates v. North Carolina Dept. of Transp., 2009, 684 S.E.2d 725. Automobiles ⇦ 252

Under the Tort Claims Act, negligence is determined by the same rules as those applicable to private parties. Phillips ex rel. Bates v. North Carolina Dept. of Transp., 2009, 684 S.E.2d 725. Municipal Corporations ⇦ 723

14.3. Standard of care

Negligence was the standard of care applicable to minor accident victim's claim for damages under the Tort Claims Act against Department of Transportation following accident allegedly caused by drop-off between paved and unpaved portions of highway. Phillips ex rel. Bates v. North Carolina Dept. of Transp., 2009, 684 S.E.2d 725. Automobiles ⇦ 256

21.5. Summary judgment

Failure of state Department of Crime Control and Public Safety to assert affirmative defense of collateral estoppel in its original answer or its answer to amended complaint did not preclude Department from raising collateral estoppel in its motion for summary judgment in arrestee's action, which was brought before Industrial Commission under Tort Claims Act. Barfield v. North Carolina Dept. of Crime Controls and Public Safety, 2010, 2010 WL 313422. Judgment ⇦ 183; Judgment ⇦ 948(1); Judgment ⇦ 948(2)

State Department of Crime Control and Public Safety failed to show that Industrial Commission's denial of motion for summary judgment based on defense of collateral estoppel affected substantial right, and thus interlocutory order denying motion did not warrant immediate appellate review in arrestee's action under Tort Claims Act; Department made no legal or factual argument whatsoever that substantial right would be affected if merits of action were not reached immediately, and cases cited by Department were not factually analogous. Barfield v. North Carolina Dept. of Crime Controls and Public Safety, 2010, 2010 WL 313422. States ⇦ 184.34

24. Weight and sufficiency of evidence

Witness's testimony, in minor accident victim's action against Department of Transportation for benefits under the Tort Claims Act, that roadway had been recently topped and that "there was approximately—about this much difference between the top of the road and the ground, which, I'd say, is about four and half—five inches" was

sufficient to support Industrial Commission's finding of fact that witness had noticed that there was a drop-off from the paved portion of the highway to the unpaved portion of the highway of four and one-half to five inches. Phillips ex rel. Bates v. North Carolina Dept. of Transp., 2009, 684 S.E.2d 725. Automobiles ⇐ 306(4)

Witnesses' testimony in minor accident victim's Tort Claims Act action against Department of Transportation (DOT) was sufficient to support Industrial Commission's finding of fact that a drop-off of four and one-half to six inches from the paved to the unpaved portion of any road creates a hazardous condition that needs immediate attention and that, under DOT guidelines, a drop-off should be repaired quickly any time the unpaved portion of a roadway is three or more inches below the grade of the paved portion; engineer testified that DOT manual guided maintenance and provided for unpaved shoulder maintenance "when the area adjacent to the pavement is approaching a three-inch dropoff," and maintenance engineer testified that dropoff was significant and that, if they had known about the dropoff, they would have barricaded the area until they scheduled the repair, "which would have been done quickly." Phillips ex rel. Bates v. North Carolina Dept. of Transp., 2009, 684 S.E.2d 725. Automobiles ⇐ 306(4)

There was no evidence that Department of Transportation (DOT) had actual or constructive notice of drop-off between highway's paved roadway and its unpaved shoulder, and thus did not breach its duty to minor accident victim who brought claim under the Tort Claims Act for damages following accident on highway; witness who testified that highway had been resurfaced two weeks prior to the accident and that the shoulder was not graded thereafter to address the significant drop-off had not reported the drop-off to the DOT, and DOT engineer testified that, had the problem come to the DOT's attention, they would have immediately inspected the problem and placed warning signs if needed and that it was impossible to tell how long repairs to shoulder would last due to moisture and trucks. Phillips ex rel. Bates v. North Carolina Dept. of Transp., 2009, 684 S.E.2d 725. Automobiles ⇐ 272; Automobiles ⇐ 306(4)

34. Scope and extent of review

Minor accident victim, who argued that the Industrial Commission erred by finding that he failed to meet his burden of proving the Department of Transportation's negligence in connection with highway accident, failed to point to any specific finding of fact or conclusion of law which would allow the Court of Appeals to consider whether competent evidence existed to support the Commission's findings of fact or whether the Commission's findings of fact justified its conclusions of law and decision, and thus Court would deem argument abandoned on appeal. Phillips ex rel. Bates v. North Carolina Dept. of Transp., 2009, 684 S.E.2d 725. States ⇐ 184.40(1)

§ 143–299. Limitation on claims

Notes of Decisions

Summary judgment 1

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1. Summary judgment

Sovereign immunity argument of state Department of Crime Control and Public Safety was actually grounded in defense of statute of limitations, not immunity from suit altogether, and thus Industrial Commission's interlocutory order denying Department's motion for summary judgment was not subject to immediate appellate review in arrestee's action under Tort Claims Act; essence of Department's argument was that arrestee did not fall within scope of session law permitting filing of certain claims beyond limitations period and, therefore, that his claim was barred by statute of limitations. Barfield v. North Carolina Dept. of Crime Controls and Public Safety, 2010, 2010 WL 313422. States ⇐ 184.34

Article 49A

Equal Employment Practices

§ 143–422.2. Legislative declaration

Notes of Decisions

3. Prima facie case of discrimination

Discharged employee's allegations did not create prima facie case of age and disability discrimination against his employer under either Age Discrimination in Employment Act (ADEA) or North Carolina Equal Employment Practices Act (EEPA); employer's officials thought employee's job performance was subpar, while working for employer as a corporate officer employee usurped a business opportunity for employer by secretly working for third party with which employer hoped to contract, and there was no evidence that employer replaced employee with worker outside employee's protected class and in fact, employer absorbed his position and used part-time contractor to perform some of his work. Hardin v. Bel-

mont Textile Machinery Co., 2009, 2009 WL 4609773, Unreported. Civil Rights ⇐ 1204; Civil Rights ⇐ 1220

14. Summary judgment

District court did not abuse its discretion in ruling on all of issues raised by employer's summary judgment motion on discharged employee's claims alleging wrongful retaliatory discharge under North Carolina law, common law fraud, wrongful discharge due to age and disability discrimination in violation of state and federal law, and violation of North Carolina's Wage and Hour Act following dismissal of federal claims; federal issues before district court were closely connected to state claims, and district court had long and close familiarity with facts. Hardin v. Belmont Textile Machinery Co., 2009, 2009 WL 4609773, Unreported. Federal Courts ⇐ 18

Chapter 143B

Executive Organization Act of 1973

Article 8

Department of Transportation

Part 1. General Provisions

§ 143B–346. Department of Transportation—purpose and functions

Notes of Decisions

2. Duties

The Department of Transportation's (DOT's) duty to the general public is to plan, design, locate, construct and maintain the public highways in the State of North Carolina, with reasonable care. Phillips ex rel. Bates v. North Carolina Dept. of Transp., 2009, 684 S.E.2d 725. Automobiles ⇐ 256; Automobiles ⇐ 259

Chapter 150B

Administrative Procedure Act

Article 3A

Other Administrative Hearings

§ 150B–39. Depositions; discovery; subpoenas

Notes of Decisions

Construction and application 1

1. Construction and application

Administrative Procedures Act (APA) does not permit one to engage in formal discovery while an agency is still investigating the merits of a complaint. North Carolina State Bd. of Dental Examiners v. Woods, 2010, 2010 WL 313556. Administrative Law and Procedure ⇐ 466

Article 4

Judicial Review

§ 150B–43. Right to judicial review

Notes of Decisions

1. In general

Before a party may ask the courts for relief from a decision of a constituent institution of the state university system; (1) the person must be aggrieved, (2) there must be a contested case, and (3) the administrative remedies provided by the university system must be exhausted. Johnson v. University of North Carolina, 2010, 2010 WL 356273. Colleges and Universities ⇐ 8.1(6.1)

5. Standing

Respiratory care practitioner was not aggrieved by North Carolina Respiratory Care Board deci-

sion which determined she practiced without a license on one occasion, and thus practitioner lacked standing to petition for judicial review, where Board's action did not affect practitioner's interest in her person, property, or employment, practitioner was not required to pay any monetary penalties, decision did not substantially affect practitioner's present employment, and there was no record of the decision to substantially affect practitioner's future employment. Thompson v. North Carolina Respiratory Care Bd., 2010, 2010 WL 348351. Health ⇐ 223(1)

In order to have standing to appeal an administrative decision under statute, (1) the petitioner must be an aggrieved party, (2) there must be a final agency decision, (3) the decision must result from a contested case, (4) the petitioner must have exhausted all administrative remedies, and (5) there must be no other adequate procedure for judicial party. Thompson v. North Carolina Respiratory Care Bd., 2010, 2010 WL 348351. Administrative Law and Procedure ⇐ 229; Administrative Law and Procedure ⇐ 668; Administrative Law and Procedure ⇐ 704

§ 150B–51. Scope and standard of review

Notes of Decisions

2. Purpose

Legislative intent of statute governing review of case in which ALJ made a decision that was not followed by agency is to increase the judicial scope of review in cases in which an agency rejects the ALJ's decision; prior to enactment of statute, standard of review for findings of fact in final agency decision was very deferential to agency. Hensley v. North Carolina Department of Environment and Natural Resources, 2009, 685 S.E.2d 570.

8. —— Findings and conclusions, scope of review

Plain language of statute governing review of case in which an ALJ made a decision that was not followed by agency permits the trial court to review the official record and make its own findings of fact and conclusions of law, without giving deference to any prior agency or ALJ decision. Hensley v. North Carolina Department of Environment and Natural Resources, 2009, 685 S.E.2d 570.

Statute governing review of case in which an ALJ made decision that was not followed by agency presumably makes clear that, unlike the de novo review of questions of law under the traditional standard of review in which the court might, in some cases, give some deference even to questions of law, such deference is not to be given to any aspect of any prior decision in the case. Hensley v. North Carolina Department of Environment and Natural Resources, 2009, 685 S.E.2d 570.

11. —— Error of law, review of questions of law

Provision in Administrative Procedure Act setting forth contested case standard of judicial review in effect at time that trial court reviewed Tax Review Board's administrative decision, and found that taxpayer was not entitled to Lee Act tax credits, did not absolve trial court from necessity for applying usual standard of review, which precluded court from making additional findings of fact; version of contested case statute in effect at time specifically exempted Department of Taxation from contested case provisions of Act, Office of Administrative Hearings was not involved in administrative process, and no administrative law judge was involved in process of making a decision. North Carolina Dept. of Revenue v. Bill Davis Racing, 2009, 684 S.E.2d 914. Taxation ⇐ 2699(7)

12. —— De novo review, review of questions of law

In cases appealed from administrative agencies, questions of law receive de novo review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test. North Carolina Dept. of Revenue v. Bill Davis Racing, 2009, 684 S.E.2d 914. Administrative Law and Procedure ⇐ 788; Administrative Law and Procedure ⇐ 796

16. Review of questions of fact—In general

Trial court reviewing agency decision that did not follow ALJ's decision is permitted to make its own findings of fact, even though neither party objected to ALJ's findings. Hensley v. North Carolina Department of Environment and Natural Resources, 2009, 685 S.E.2d 570.

When construing statutes, courts first determine whether the statutory language is clear and unambiguous. Hensley v. North Carolina Department of Environment and Natural Resources, 2009, 685 S.E.2d 570.

28. Review

Even though the literal language of the superior court's order seemingly dismissed high school students' petitions for judicial review of school board's decision upholding students' long-term suspensions for fighting, the superior court, in fact, exercised the appropriate appellate standard of review in affirming the board's decision; the superior court applied the whole record test to students' claims that the board abused its discretion and acted arbitrarily and capriciously, and superior court reviewed school board's alleged violations of students' constitutional rights de novo. Hardy ex rel. Hardy v. Beaufort County Bd. of Educ., 2009, 685 S.E.2d 550. Schools ⇐ 177

§ 150B–52. Appeal; stay of court's decision

Notes of Decisions

Sufficiency of evidence 8

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8. Sufficiency of evidence

In action brought by former provider of HIV case management services, challenging its decertification by the North Carolina Department of Health and Human Services (DHHS), substantial evidence supported Superior Court's factual findings that HIV case management service providers were required to keep certain documentation to provide an audit trail for the DHHS and permit access to and examination of that documentation by the DHHS, that provider's violations of those requirements were systemic, and that the DHHS was justified in not allowing corrective action. Bradley-Reid Corp. v. North Carolina Dept. of Health and Human Services, Div. of Public Health, 2009, 2009 WL 5174287.

Chapter 153A

Counties

Article 6

Delegation and Exercise of the General Police Power

§ 153A–121. General ordinance-making power

Notes of Decisions

2. In general

Statute relating to the county police power did not provide independent source of authority for county to implement adequate public facilities ordinance (APFO) requiring developers to pay voluntary mitigation payment (VMP) intended to assist county in determining whether to issue or deny development permits, since authority of a county to regulate development of real estate was expressly limited in zoning and subdivision regulation statutes. Union Land Owners Ass'n v. County of Union, 2009, 2009 WL 5174288. Zoning and Planning ⇦ 86

A county's police power allows restricting uses of property when it reasonably believes that in so doing it will promote the most appropriate use of the restricted property and will conserve the values of other properties. Union Land Owners Ass'n v. County of Union, 2009, 2009 WL 5174288. Zoning and Planning ⇦ 6

Statute setting forth county police power did not provide independent source of authority for county to implement adequate public facilities ordinance (APFO), which authorized assessment of voluntary mitigation payment (VMP) against developers, as condition of approval of proposal, to offset excess impact on school capacity resulting from proposed development, since authority of county to regulate development of real estate was expressly limited in zoning and subdivision regulation statutes. Union Land Owners Ass'n v. County of Union, 2009, 2009 WL 5174288. Zoning and Planning ⇦ 86

Article 18

Planning and Regulation of Development

Part 2. Subdivision Regulation

§ 153A–330. Subdivision regulation

Notes of Decisions

Validity of ordinances ½

½. Validity of ordinances

Subdivision statutes did not provide county with authority to implement adequate public facilities ordinance (APFO) requiring developers to pay voluntary mitigation payment (VMP) intended to assist county in determining whether to issue or deny development permits, where county had no inherent legislative powers, but, rather, was an instrumentality of state government and possessed only those powers the General Assembly had conferred upon it, and nowhere within the subdivision statutes did the General Assembly authorize county to adopt a land use regulation ordinance pursuant to which a developer could be forced to make a payment of money. Union Land Owners Ass'n v.

County of Union, 2009, 2009 WL 5174288. Zoning and Planning ⇐ 86

Subdivision statutes did not provide county with authority to implement adequate public facilities ordinance (APFO), which authorized assessment of voluntary mitigation payment (VMP) against developers, as condition of approval of proposal, to offset excess impact on school capacity resulting from proposed development; nowhere within subdivision statutes did General Assembly authorize county to adopt land use regulation ordinance pursuant to which developer could be forced to make payment of money. Union Land Owners Ass'n v. County of Union, 2009, 2009 WL 5174288. Zoning and Planning ⇐ 86

§ 153A–331. Contents and requirements of ordinance

Notes of Decisions

Validity of ordinances ½

½. Validity of ordinances

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Part 3. Zoning

§ 153A–340. Grant of power

Notes of Decisions

1. Validity of ordinances

Zoning statute did not provide county with authority to implement adequate public facilities ordinance (APFO) requiring developers to pay voluntary mitigation payment (VMP) intended to assist county in determining whether to issue or deny development permits, although county was entitled to use its zoning authority to facilitate the efficient and adequate provision of schools, where the APFO did not utilize any of the powers enumerated in the zoning statute to implement county's objective of facilitating the efficient and adequate provision of schools. Union Land Owners Ass'n v. County of Union, 2009, 2009 WL 5174288. Zoning and Planning ⇐ 86

Zoning statute did not provide county with authority to implement adequate public facilities ordinance (APFO), which authorized assessment of voluntary mitigation payment (VMP) against developers, as condition of approval of proposal, to offset excess impact on school capacity resulting from proposed development; although county was entitled to use its zoning authority to facilitate efficient and adequate provision of schools, APFO did not utilize any of the powers enumerated in zoning statute to implement county's objective of facilitating efficient and adequate provision of schools. Union Land Owners Ass'n v. County of Union, 2009, 2009 WL 5174288. Zoning and Planning ⇐ 86

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§ 153A–341. Purposes in view

Notes of Decisions

Validity of ordinances ½

½. Validity of ordinances

Zoning statute did not provide county with authority to implement adequate public facilities ordinance (APFO) requiring developers to pay voluntary mitigation payment (VMP) intended to assist county in determining whether to issue or deny development permits, although county was entitled to use its zoning authority to facilitate the efficient and adequate provision of schools, where the APFO did not utilize any of the powers enumerated in the zoning statute to implement county's objective of facilitating the efficient and adequate provision of schools. Union Land Owners Ass'n v. County of Union, 2009, 2009 WL 5174288. Zoning and Planning ⇦ 86

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Chapter 160A

Cities and Towns

Article 15

Streets, Traffic and Parking

§ 160A–296. Establishment and control of streets; center and edge lines

Notes of Decisions

33. —— Immunity, liability for breach of duty to keep in proper repair

Statute, which gives municipality the authority to regulate the use of its streets and sidewalks and, in addition, imposes a positive duty upon the municipality to keep them in proper repair, creates an exception to the doctrine that a municipality will have immunity from liability for negligence in the performance of a governmental function, and by reason thereof, the doctrine of governmental immunity has no application to protect a city from liability for a negligent breach of the statutory duties so imposed. Beckles-Palomares v. Logan, 2010, 2010 WL 348396. Municipal Corporations ⇦ 755(1); Municipal Corporations ⇦ 757(1)

35. Duty to keep free from obstructions—In general

Municipalities have the positive duty to maintain their streets and sidewalks in a safe condition and keep them free of unnecessary obstructions and are civilly liable for negligently failing to discharge that duty. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇦ 252; Automobiles ⇦ 264; Municipal Corporations ⇦ 757(1); Municipal Corporations ⇦ 761(1)

41. —— Liability for negligence, duty to keep free from obstructions

There was no evidence to support driver's contention that town negligently failed to trim and/or maintain trees and shrubbery on property at corner of intersection of town street and state highway where traffic accident occurred; there was no evidence that view on town street was obstructed, and responsibility for any shrubbery that obstructed view down state highway was with the state Department of Transportation. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇦ 269

46. —— Grounds of relief, duty to keep free from obstructions

Material issues of fact as to whether vegetation and parked cars constituted obstructions, whether city had actual or implied notice of the obstructions, and whether it was reasonably foreseeable that obstructions to vision of minor bicyclist and to motorist, whose car struck and killed bicyclist, could cause traffic accident precluded grant of summary judgment to city on claim brought by estate of bicyclist under statute, giving municipality the authority to regulate the use of its streets and sidewalks and, in addition, imposing a positive duty upon the municipality to keep them in proper repair, in a reasonably safe condition, and free from unnecessary obstructions. Beckles-Palomares v. Logan, 2010, 2010 WL 348396. Judgment ⇦ 181(33)

52. Use and regulation of public streets and ways of passage—Authority to control and regulate

Town did not breach any duty to install appropriate traffic signaling devices at intersection

where accident occurred, where driver on road under town control was able to see stop sign, stopped at stop sign, and looked both ways before driving into intersection where she collided with truck driving on state highway under control of the state Department of Transportation. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇐ 279

Town did not have control of state highway which allegedly had insufficient site distance for motorists entering intersection of state highway and town street and thus did not breach any duty to car driver to maintain proper site distance for motorists entering intersection; driver, who was on town road, stopped at corner and did not have a limited site distance on town road or any difficulty recognizing the stop sign at the intersection. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇐ 255

Town was not negligent for failing to reduce the speed limit at intersection of town street and state highway where accident occurred; speed limit on town street was not at issue, as driver came to a stop when she reached the intersection, while speed limit on state highway was not within town's authority. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇐ 277.1

85. —— Review, actions for injuries

Testimony of expert witness that town had certain duties as regards the safety of town street did not create a genuine issue of material fact for summary judgment purposes as to town's liability for accident at intersection of street and state highway; question of town's legal liability was a question of law for the court, and expert was not tendered as an expert in the law, statutory interpretation, or other relevant area. Blackwell v. Hatley, 2010, 2010 WL 348187. Judgment ⇐ 185.3(21)

§ 160A–297. Streets under authority of Board of Transportation

Notes of Decisions

2. —— Control, liability of city

Town did not breach any duty to install appropriate traffic signaling devices at intersection where accident occurred, where driver on road under town control was able to see stop sign, stopped at stop sign, and looked both ways before driving into intersection where she collided with truck driving on state highway under control of the state Department of Transportation. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇐ 279

Town did not have control of state highway which allegedly had insufficient site distance for motorists entering intersection of state highway and town street and thus did not breach any duty to car driver to maintain proper site distance for motorists entering intersection; driver, who was on town road, stopped at corner and did not have a limited site distance on town road or any difficulty recognizing the stop sign at the intersection. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇐ 255

There was no evidence to support driver's contention that town negligently failed to trim and/or maintain trees and shrubbery on property at corner of intersection of town street and state highway where traffic accident occurred; there was no evidence that view on town street was obstructed, and responsibility for any shrubbery that obstructed view down state highway was with the state Department of Transportation. Blackwell v. Hatley, 2010, 2010 WL 348187. Automobiles ⇐ 269

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ARTICLE 19

Planning and Regulation of Development

Part 1. General Provisions

§ 160A–364.1. Statute of limitations

Notes of Decisions

Construction and application 1.5

1.5. Construction and application

Two-month limitations period for challenges to zoning ordinances did not apply to neighbors' challenge to subdivision ordinance's notice provisions, as zoning and subdivision ordinances were separately regulated. Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte, 2010, 2010 WL 355440. Zoning and Planning ⇐ 584.1

Part 3. Zoning

§ 160A–381. Grant of power

Notes of Decisions

35. Conditional use permits—In general

Town board was required to make findings of fact justifying its decision to adopt two conditions attached to conditional use permit. Northwest Property Group, LLC v. Town of Carrboro, 2009, 2009 WL 5066913. Zoning and Planning ⇐ 439

§ 160A–385. Changes

Notes of Decisions

17. Vested or property rights

Unrevoked but invalid county building permit did not vest right in billboard sign owner to erect billboard after city enacted zoning amendment prohibiting billboards; building inspector issued the renewed building permit by mistake after owner's city sign permit had expired, and thus building permit was invalid. Morris Communications Corp. v. City of Bessemer City Zoning Bd. of Adjustment, 2010, 2010 WL 702806. Zoning and Planning ⇐ 376

§ 160A–388. Board of adjustment

Notes of Decisions

Standing 12.5

12. Person aggrieved

An "aggrieved party" entitled to seek review of decisions made by boards of adjustment under zoning ordinances is one who can either show an interest in the property affected, or if the party is a nearby property owner, some special damage, distinct from the rest of the community. Bailey and Associates, Inc. v. Wilmington Bd. of Adjustment, 2010, 2010 WL 355694. Zoning and Planning ⇐ 571

12.5. Standing

Neighbors' allegation that development of creekside parcel without Conservation Overlay District controls would increase traffic, light pollution, noise and other related pollution that would lead to a pecuniary loss in the value of their properties was sufficient to confer standing on them to intervene in developer's action which challenged board of adjustment decision that developer's property, which also was adjacent to creek, was located in Conservation Overlay District and thus was subject to various controls. Bailey and Associates, Inc. v. Wilmington Bd. of Adjustment, 2010, 2010 WL 355694. Zoning and Planning ⇐ 583

Part 5. Building Inspection

§ 160A–422. Revocation of permits

Notes of Decisions

Construction and application 1

1. Construction and application

Unrevoked but invalid county building permit did not vest right in billboard sign owner to erect billboard after city enacted zoning amendment prohibiting billboards; building inspector issued the renewed building permit by mistake after owner's city sign permit had expired, and thus building permit was invalid. Morris Communications Corp. v. City of Bessemer City Zoning Bd. of Adjustment, 2010, 2010 WL 702806. Zoning and Planning ⇦ 376

Constitution of North Carolina

ARTICLE I

DECLARATION OF RIGHTS

Section 1. The equality and rights of persons

Notes of Decisions

1. Construction of constitution

Person may bring direct claim under North Carolina Constitution if no other adequate state remedy exists. Munn-Goins v. Board of Trustees of Bladen Community College, 2009, 658 F.Supp.2d 713. Civil Rights ⇦ 1704

Section of North Carolina constitution intended to echo United States Declaration of Independence by providing that all persons are created equal and endowed by their Creator with certain inalienable rights, among them life, liberty, enjoyment of fruits of their own labor, and pursuit of happiness does not create constitutionally protected interest in particular job. Munn-Goins v. Board of Trustees of Bladen Community College, 2009, 658 F.Supp.2d 713. Constitutional Law ⇦ 1114

Sec. 6. Separation of powers

Notes of Decisions

22. —— Judiciary, legislative delegation of powers

Statute authorizing school board to file action against county commission if no budget agreement is reached at mediation, and requiring trial court to determine amount necessary to fund system of free public schools and then to enter judgment against county commission if court finds cost of schooling is greater than amount appropriated, does not impermissibly delegate legislature's constitutional duty to provide for general and uniform system of free public schools; since legislature has so exhaustively defined its desired system, procedure does no more than invite courts to adjudicate a disputed fact. Duplin County Bd. of Educ. v. Duplin County Bd. of County Com'rs, 2009, 686 S.E.2d 169. Schools ⇦ 91

Sec. 14. Freedom of speech and press

Notes of Decisions

2. Construction with federal constitution

Assuming that a public employee may rely on North Carolina Constitution as a source of public policy in a wrongful-discharge claim, standard for free speech claims under North Carolina Constitution and United States Constitution is nearly identical; in fact, North Carolina courts apply *Connick-Pickering* standard to such claims. Iglesias v. Wolford, 2009, 2009 WL 3642790. Constitutional Law ⇦ 1947

Standards for free-speech claims under North Carolina Constitution are substantially identical to those for free-speech claims under federal constitution. Munn-Goins v. Board of Trustees of Bladen Community College, 2009, 658 F.Supp.2d 713. Constitutional Law ⇦ 1493

Sec. 16. Ex post facto laws

Notes of Decisions

19. Sentences and punishment, generally

Retroactive application to defendant, who pleaded guilty to taking indecent liberties with a minor, of statutory provisions requiring certain offenders, including those with a conviction for an offense against minors, to submit to lifetime satellite-based monitoring did not violate the constitutional ex post facto clauses. State v. Vogt, 2009, 685 S.E.2d 23. Constitutional Law ⇦ 2820; Mental Health ⇦ 433(2)

Sec. 18. Courts shall be open

Notes of Decisions

1. Construction and application

As predicted by federal district court, North Carolina constitution's open court provision does not include right to seek counsel and pursue effective remedies. Munn-Goins v. Board of Trustees of Bladen Community College, 2009, 658 F.Supp.2d 713. Constitutional Law ⇦ 2311

Sec. 19. Law of the land; equal protection of the laws

Notes of Decisions

I. IN GENERAL

1. In general

Fourteenth Amendment to United States Constitution and North Carolina constitution's law of the land clause are interpreted coterminously. Munn-Goins v. Board of Trustees of Bladen Community College, 2009, 658 F.Supp.2d 713. Constitutional Law ⇦ 3847

2. Due process—In general

The expression "the law of the land" as used in the state constitution provision stating that "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land" is synonymous with the expression "due process of law." In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 3842

Procedural due process protection ensures that government action depriving a person of life, liberty, or property is implemented in a fair manner. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 3867

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 3879

The length and consequent severity of a deprivation are considered in determining what procedural protections are constitutionally required by due process. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 3912

The threshold question in any due process claim is whether a constitutionally protected property interest exists. Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte, 2010, 2010 WL 355440. Constitutional Law ⇦ 3874(1)

4. —— Requisites generally, due process

The court examines procedural due process questions in two steps: first, the court must determine whether there exists a liberty or property interest which has been interfered with by the State, and second, the court must determine whether the procedures attendant upon that deprivation were constitutionally sufficient. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 3867

Three factors must be considered by a court in determining what procedures are constitutionally sufficient to provide due process: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 3875

If the State feasibly can provide a hearing before depriving an individual of a protected interest, due process generally requires it to do so in order to minimize substantively unfair or mistaken deprivations. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 3912

If the due process right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 3912

While an individual's possessions can be returned to him if it is determined at a later hearing that they were unfairly or mistakenly taken in the first place and damages may even be awarded to him for such a wrongful deprivation, no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 3912

The failure to provide a pre-deprivation due process hearing is acceptable only if (1) a pre-deprivation hearing would be unduly burdensome in proportion to the liberty interest at stake, (2) the State is unable to anticipate the deprivation, or (3) an emergency requires immediate action. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 3912

Invocation of constitutional protection against takings without just compensation or without due process requires a property interest on the part of the person seeking such protection; where there is no property interest, there is no entitlement to constitutional protection. Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte, 2010, 2010 WL 355440. Constitutional Law ⇦ 3874(1); Eminent Domain ⇦ 81.1

To have a property interest that is subject to constitutional protection, the individual must be entitled to a benefit created and defined by a source independent of the Constitution, such as state law. Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte, 2010, 2010 WL 355440. Constitutional Law ⇦ 3874(3)

7. —— Property, due process

A vested right, entitled to protection from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or legal exemption for a demand by another. Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte, 2010, 2010 WL 355440. Constitutional Law ⇦ 2630; Constitutional Law ⇦ 2632

There is no such thing as a vested right in the continuation of an existing law. Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte, 2010, 2010 WL 355440. Constitutional Law ⇦ 2630

9. —— Classifications, equal protection

As predicted by federal district court in that state, North Carolina would not recognize equal protection "class of one" claim under state constitution in public employment context. Munn-Goins v. Board of Trustees of Bladen Community College, 2009, 658 F.Supp.2d 713. Constitutional Law ⇦ 3593

55. Family law

Due process requires the State, in a pre-deprivation hearing, to substantiate a report of child abuse or neglect by a preponderance of the evidence before an individual's name can be included in and disseminated from the Responsible Individuals List (RIL) of individuals who have allegedly abused or neglected children; the director of the department of social services has the burden of proving abuse or serious neglect and identifying the responsible individual by a preponderance of the evidence. In re W.B.M., 2010, 2010 WL 702752. Constitutional Law ⇦ 4403; Infants ⇦ 133

69.5. Travel, right to

Motor vehicle registration and financial responsibility statutes were legitimate exercises of the state's police power that did not violate defendant's right to travel. State v. Sullivan, 2009, 2009 WL 5067454.

The right to travel upon the public streets of a city is a part of every individual's liberty, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Law of the Land Clause. State v. Sullivan, 2009, 2009 WL 5067454.

The right to travel may be regulated, as to the time and manner of its exercise, when reasonably deemed necessary to the public safety, by laws reasonably adapted to the attainment of that objective. State v. Sullivan, 2009, 2009 WL 5067454.

The right to travel is not synonymous with the right to operate a motor vehicle on the highways of the state. State v. Sullivan, 2009, 2009 WL 5067454.

The operation of a motor vehicle on state highways is not a natural right; it is a conditional privilege, which may be suspended or revoked under the police power. State v. Sullivan, 2009, 2009 WL 5067454.

71. Motor vehicle operation

The license or permit to operate a motor vehicle on the highways of the state is not a contract or property right in a constitutional sense. State v. Sullivan, 2009, 2009 WL 5067454.

126. Review

Neighbors did not have any constitutionally-protected property interest against changes in the treatment of adjoining tracts of property under properly-adopted zoning or subdivision ordinances as required to maintain claim that subdivision ordinance, which required notice of appeal within 10 days of subdivision preliminary plan approval but which did not require notice of any such approval, violated their due process rights; neighbors asserted nothing more than a reliance on the continued existence of the existing legal situation coupled with a mere expectation that no change to which neighbors objected would be made in the use of the adjoining property. Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte, 2010, 2010 WL 355440. Constitutional Law ⇦ 4096; Zoning and Planning ⇦ 86

Sec. 20. General warrants

Notes of Decisions

12. Probable cause, generally

Evidence obtained in one location cannot provide probable cause for the search of another location when the evidence offered does not implicate the premises to be searched. State v. Washburn, 2009, 685 S.E.2d 555. Searches and Seizures ⇐ 40.1

22. —— Issuance of warrant, narcotics and dangerous drugs

Substantial basis existed for a magistrate to conclude that there was probable cause to issue a warrant to search defendant's residence for drug evidence; affiant officer offered proof of illegal drugs found in defendant's unit in a storage facility and provided statements by an informant that defendant stored additional drugs in a tool box at his residence, and the affidavit indicated the informant's reliability and basis of knowledge. State v. Washburn, 2009, 685 S.E.2d 555. Controlled Substances ⇐ 148(3)

32. Blood, hair and tissue samples

Withdrawal of a blood sample from a person is a search subject to protection by the state constitution. State v. Fletcher, 2010, 2010 WL 313748. Searches and Seizures ⇐ 14

A search warrant must be issued before a blood sample can be obtained unless probable cause and exigent circumstances exist that would justify a warrantless search. State v. Fletcher, 2010, 2010 WL 313748. Searches and Seizures ⇐ 24; Searches and Seizures ⇐ 42.1; Searches and Seizures ⇐ 44

Statute allowing a police officer to compel a person to provide a blood sample for alcohol testing without a warrant under certain circumstances does not violate the constitutional guarantee of freedom from unreasonable searches and seizures; the statute requires both probable cause and an officer's reasonable belief that a delay in testing would result in dissipation of the person's blood alcohol content, i.e., exigent circumstances. State v. Fletcher, 2010, 2010 WL 313748. Automobiles ⇐ 412

Record supported a determination that exigent circumstances existed to justify a warrantless withdrawal of a sample of defendant's blood for alcohol testing; defendant had failed multiple field-sobriety tests and was unsuccessful at producing a valid breath sample, a police officer testified that a magistrate's office was 12 miles away and that the office and the hospital were often busy on weekend nights, and any alcohol in defendant's blood was being eliminated at a constant rate. State v. Fletcher, 2010, 2010 WL 313748. Automobiles ⇐ 419

Record supported a determination that police officer had a reasonable belief that a delay caused by obtaining a court order would result in the dissipation of the percentage of alcohol in defendant's blood, so as to allow officer to compel defendant to provide a blood sample without a court order, given that defendant refused to submit to a test; officer testified that a magistrate's office was 12 miles away and that the office and the hospital were often busy on weekend nights, and officer opined that the entire process of driving to the magistrate's office, standing in line, filling out the required forms, returning to the hospital, and having defendant's blood drawn would have taken two to three hours. State v. Fletcher, 2010, 2010 WL 313748. Automobiles ⇐ 419

Sec. 23. Rights of accused

Notes of Decisions

III. CONFRONTATION

117. —— Nature and scope of right, presence of defendant at trial, confrontation

Defendant's right to be present at all proceedings of his capital trial is unwaivable. State v. Williams, 2009, 686 S.E.2d 493. Criminal Law ⇐ 636(1); Sentencing and Punishment ⇐ 345

Random segregation of entire jury pool so that it could be split among defendant's capital murder proceeding and other matters being handled at the courthouse was a purely administrative matter and was not a "proceeding" at which defendant was entitled to be present. State v. Williams, 2009, 686 S.E.2d 493. Criminal Law ⇐ 636(3)

130. —— Waiver, presence of defendant at trial, confrontation

Defendant's right to be present at all proceedings of his capital trial is unwaivable. State v. Williams, 2009, 686 S.E.2d 493. Criminal Law ⇐ 636(1); Sentencing and Punishment ⇐ 345

Sec. 25. Right of jury trial in civil cases

Notes of Decisions

5. Nature and scope of right

The constitutional right to trial by jury is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury. Burton v. Williams, 2010, 2010 WL 313419. Jury ⇐ 9; Jury ⇐ 31.2(1)

If the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn, it is proper to direct the verdict for the proponent notwithstanding a party's right to a jury trial. Burton v. Williams, 2010, 2010 WL 313419. Jury ⇦ 34(3); Trial ⇦ 142

While not unconstitutional, it is ordinarily not appropriate to direct a verdict in favor of the party with the burden of proof. Burton v. Williams, 2010, 2010 WL 313419. Trial ⇦ 139.1(11)

Sec. 34. Perpetuities and monopolies

Notes of Decisions

8. Rule against perpetuities

The North Carolina Constitution's prohibition of perpetuities prohibits unreasonable restraints on alienation without requiring a rule specifying a time period within which a future interest must vest. Brown Bros. Harriman Trust Co., N.A. v. Benson, 2010, 2010 WL 348317. Perpetuities ⇦ 6(1)

Statute which expressly superseded the common law rule against perpetuities and required the existence of the power of alienation rather than that remote future interests vest or terminate within a certain time period did not violate the state constitution's prohibition against of perpetuities, although it allowed a trust to remain valid in perpetuity as long as the appropriate rights of sale or termination were held. Brown Bros. Harriman Trust Co., N.A. v. Benson, 2010, 2010 WL 348317. Perpetuities ⇦ 6(1); Perpetuities ⇦ 6(2)

ARTICLE IV

JUDICIAL

Sec. 12. Jurisdiction of the General Court of Justice

Notes of Decisions

2. Supreme Court jurisdiction—In general

The jurisdiction of the Supreme Court is conferred and defined by the State Constitution and not by the General Assembly. Duplin County Bd. of Educ. v. Duplin County Bd. of County Com'rs, 2009, 686 S.E.2d 169. Courts ⇦ 1

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